IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71——

LEWIS L. COLASURDO, MICHAEL J. McLANEY, ANTHONY CIPO and EVERETT A. WHORL,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	32

TABLE OF AUTHORITIES

Cases

American Communications Association v. *Douds*, 339 U.S. 382 (1950)	25
Ashton v. *Kentucky*, 384 U.S. 195 (1966)	25
Ex Parte Bain, 121 U.S. 1 (1887)	10, 11, 12, 13
Bury v. *United States*, 292 F.2d 53 (10 Cir. 1961)	13
Branzburg v. *Hayes*, No. 70-85	25
Bruton v. *United States*, 391 U.S. 123 (1968)	20
Caldwell v. *United States*, 434 F.2d 1081 (9th Cir. 1970) *cert. granted*, 402 U.S. 942 (1971)	25, 30-31
Carney v. *United States*, 163 F.2d 784 (9th Cir. 1947), *cert. denied*, 332 U.S. 824 (1947)	14
Cline v. *Frink Dairy Co.*, 274 U.S. 445 (1927)	25
Coppedge v. *United States*, 369 U.S. 438 (1962)	28
Costello v. *United States*, 350 U.S. 359 (1956)	27, 28
Dutton v. *Evans*, 400 U.S. 74 (1970)	20
Forman v. *United States*, 361 U.S. 416 (1960)	19
Gaither v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969)	13
Gelbard v. *United States*, No. 71-110, *cert. granted*, 40 U.S.L.W. 3279 (Dec. 14, 1971)	25, 26
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966)	25

Page

Grunewald v. *United States*, 353 U.S. 391 (1957) 3, 9, 14, 15, 16, 17, 18, 19, 20
Heisler v. *United States*, 394 F.2d 692 (9th Cir. 1968) *cert. denied*, 393 U.S. 986 (1968) 14
Kastigar v. *United States*, No. 70-117 25
Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 25
Lawn v. *United States*, 355 U.S. 339 (1958) 27, 28
Overstreet v. *United States*, 321 F.2d 459 (5th Cir. 1963), *cert. denied*, 376 U.S. 919 (1964) 13
In re Pappas, No. 70-94 25
Reyes v. *United States*, 417 F.2d 916 (9th Cir. 1969) 27
Rowan v. *United States*, 397 U.S. 728 (1970) 25
Russell v. *United States*, 369 U.S. 749 (1962) 11, 12
Salinger v. *United States*, 272 U.S. 542 (1926) 12, 13
Stewart v. *United States*, 12 F.2d 524 (9th Cir. 1926) 14
Tarvestad v. *United States*, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) 27
Thomas v. *United States*, 398 F.2d 531 (5th Cir. 1967) 13
United States v. *Arcuri*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969) 26
United States v. *Blue*, 384 U.S. 251 (1966) 27, 28
United States v. *Cardiff*, 344 U.S. 174 (1952) 25
United States v. *DeLeo*, 422 F.2d 487 (5th Cir.), *cert. denied*, 397 U.S. 1037 (1970) 27
United States v. *Denny*, 165 F.2d 668 (7th Cir. 1947), *cert. denied*, 333 U.S. 844 (1948) 13
United States v. *Egan*, No. 71-263, *cert. granted*, 40 U.S.L.W. 3279 (Dec. 14, 1971) 26
United States v. *Johnson*, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970) 27
United States v. *Krepper*, 159 F.2d 958 (3d Cir. 1946), *cert. denied*, 330 U.S. 824 (1947) 13
United States v. *Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970) 23
United States v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970) 12, 13

Page

Vincent v. *United States*, 337 F.2d 891 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965) 13

Statutes and Regulations:

15 U.S.C. § 78m 1, 2, 22
15 U.S.C. § 78ff(a) 1, 2
18 U.S.C. § 371 1
28 U.S.C. § 1254(1) 2
17 C.F.R. §-210.1-01, et seq. 21

Miscellaneous:

36th Annual Report of the Securities and Exchange Commission 25
Canon 4 of the American Bar Association Code of Responsibility 31
Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J., 590 (1963) 31

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming judgments of conviction against all petitioners under 18 U.S.C. § 371 and against petitioners Colasurdo and Whorl under 15 U.S.C. §§ 78m and 78ff(a) entered against them in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the court of appeals is not yet reported and is printed as Appendix A, *infra*, pp. 1a-28a.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1971 (App. B, *infra*, p. 29a). A timely petition for rehearing, with a suggestion that it be heard en banc, was denied January 20, 1972 (App. C. & D., *infra*, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

The relevant portions of 15 U.S.C. § 78m and § 78ff are set forth in Appendix G, *infra*, pp. 74a-76a.

QUESTIONS PRESENTED

1. Whether the trial judge amended the indictment in violation of the Fifth Amendment and the decisions

of this Court by removing major portions of the conspiracy count so as to conform the indictment to his view of the basic charge and to lighten the government's evidentiary burden?

2. Whether this Court's decision in *Grunewald* v. *United States*, 353 U.S. 391 (1957), which requires direct evidence of a subsidiary conspiracy to conceal prior illegal conduct, can be avoided by a trial court's striking portions of a conspiracy count charging prior illegal conduct and thereby amending the indictment so that it charges only a conspiracy to conceal?

3. Where neither the SEC statutes, rules nor regulations require that annual financial statements disclose affiliations between parties to a transaction, whether petitioner Colasurdo was denied due process by a conviction and jail sentence for failing to make such disclosure?

4. Whether this Court's decisions bar inquiry into whether the grand jury acted on evidence obtained in violation of petitioners' attorney-client privilege?

STATEMENT

Petitioners were convicted by a jury of conspiring to defraud the United States. Colasurdo was also convicted on four substantive counts of filing false statements with the SEC and Whorl was convicted on two of those counts. Colasurdo was sentenced to two years imprisonment on the conspiracy count and one year on one of the substantive counts, the sentences to run concurrently. He was fined $10,000 on each of the five counts. Whorl was sentenced to one year im-

prisonment on the conspiracy count and fined $10,000 on each of the counts on which he was convicted. Cipo and McLaney were each fined $10,000 and McLaney received a one year suspended sentence.

This case arose out of a series of complicated corporate transactions and subsequent investigations by the SEC. It is not necessary to trace the corporate transactions in elaborate detail to consider the points raised in this petition. However, for the convenience of the Court we have printed as an appendix the statement of facts from Colasurdo's brief in the court of appeals which contains a full discussion of the corporate transactions (App. E. *infra*, pp. 33a-63a).[1]

To summarize the facts briefly, Lewis Colasurdo and his brothers owned 42% of the stock of Pakco Companies, Inc., a publicly owned company whose stock is traded over the counter. From its organization until June 1965, he was president and petitioner Whorl was controller. Pakco was a diversified company which included among its assets a 2,000 acre blueberry plantation, the disposition of which was one of the focal points of the SEC investigations and the trial below.

The other principal corporation was Crescent Corporation, a publicly held company whose stock was traded on the New York Stock Exchange. Colasurdo was president of Crescent from June, 1965 until 1968 when Crescent was merged into another corporation.

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[1] The full statement of facts set forth in the appendix contains supporting references to the record which, for the sake of brevity, we omit here.

In June of 1965, ALCA, Inc., a corporation formed by Colasurdo, acquired 436,000 shares of Crescent stock for $6,546,000. One-third of that amount was paid at the closing and the remainder was to be paid in equal installments in June 1966 and June 1967. ALCA had obtained the major share of the cash payment made at the closing through a bank loan repayable in October 1965 guaranteed by Colasurdo and secured by the Crescent stock.

Also in June 1965, BLCB, Inc., a corporation formed by one Bronson, an officer of Pakco and later of Crescent, acquired 125,000 shares of Crescent for $1,875,000. One million five thousand dollars was paid at the closing and the remainder was paid in notes, guaranteed by Colasurdo, which would become due in 1966 and 1967.

Following the purchase of these two blocks of stock, Colasurdo and his nominees assumed control of the Crescent Board of Directors. Colasurdo became president and Whorl treasurer.

In May 1965, Pakco's Board of Directors decided to sell the blueberry plantation because it had become a cash drain on the corporation. Pakco sold the plantation to one Meyers who was the nominee for petitioner McLaney. McLaney took title in the name of Caletta Blueberry Co. (Caletta) on August 9, 1965. Pakco received a $3,350,000 note payable in five annual installments beginning July 1, 1970, for the plantation. For the crops on the plantation, Pakco was to receive $500,000 by December 1, 1965. The note from Caletta to Pakco was guaranteed personally

by McLaney, a wealthy investor known for many years by the Chairman of the Pakco Board. Whorl was made secretary-treasurer of Caletta, which paid Pakco in full by early 1967.

Pursuant to an agreement dated August 31, 1965, Caletta agreed to sell the plantation to Makepeace, Inc., a corporation owned by petitioner Cipo. The purchase price was $3.9 million with $500,000 due November 30, 1965, and the balance payable in five annual installments beginning March 31, 1970. The plantation was deeded to Makepeace on August 31, 1965.

In September 1965, Makepeace sold the plantation to Crescent for $4 million, consisting of $600,000 in cash, 125,000 shares of Crescent stock and a $1.9 million installment note which could be prepaid at any time. A contemporaneous independent appraisal valued the plantation at more than $4 million.

Shortly after obtaining title to the plantation, Crescent prepaid the $1.9 million note to Makepeace. Of the $2.5 million cash which Makepeace received, it paid $500,000 to Caletta which in turn paid that to Pakco. The balance of the money was transferred to an account of Delaware and New Jersey Properties, Inc., a company formed by Bronson. That company transferred the funds to ALCA which then repaid the money borrowed to purchase the Crescent stock.

Colasurdo stated to the SEC that the monies transferred to ALCA represented the proceeds of a loan to him from Six M's Ltd., a Bahamian corporation headed by Lyndon Pindling, the Premier of the Ba-

hamas. Colasurdo testified at the SEC that Six M's had just sold a $2 million debenture to Cipo and rather than take the money out of the United States and bring it in again, Six M's took over Delaware and New Jersey Properties, Inc. which received the $2 million from Cipo and then lent it to Colasurdo.

In April 1967, Pakco acquired all of the Crescent stock owned by ALCA and BLCB and 125,000 shares of Crescent stock from Caletta, thus giving it control of Crescent. In 1968, Pakco sold all of its Crescent stock to National Industries, an unrelated company, for more than $11,239,550 cash and realized a profit of $1,681,905.

On June 9, 1966 the SEC began a private investigation into the transactions described above. The investigation lasted six months, and during that time the Commission took testimony from petitioners as well as numerous other individuals. In April 1967, the Commission began public hearings at which petitioners, with the exception of Cipo, testified.

It was the SEC's position that the successive transfers of the plantation from Pakco to Caletta to Makepeace to Crescent were sham transactions, that Caletta and Makepeace were merely conduits, and that the specific purpose of these various transactions was to make the assets of Pakco and Crescent available to Colasurdo to enable him to finance the acquisition of Crescent stock. Petitioners, on the other hand, at trial and in their testimony before the SEC, took the position that the transactions were bona fide, and that the transactions were beneficial to, and intended to benefit, Pakco and Crescent.

Following the SEC investigations, the grand jury returned a 45 count indictment. It charged a conspiracy (1) to defraud the stockholders and creditors of Pakco and Crescent and the creditors from whom petitioners borrowed and (2) to defraud the SEC by concealing—through perjury, false statements (including periodic reports filed by Crescent), subornation of perjury and obstruction of justice—the alleged fraud practiced on the stockholders and creditors. It also contained substantive charges of filing false reports with the SEC and of mail fraud and perjury, but the mail fraud and prejury counts were either severed or dismissed. As the case went to the jury all petitioners were charged in the conspiracy count and Colasurdo and Whorl were charged in five counts of filing false reports with the SEC. The jury convicted all petitioners on the conspiracy count, Whorl on two filing counts and Colasurdo on four. The court of appeals affirmed on all counts.

REASONS FOR GRANTING THE WRIT

1. As voted by the grand jury, Count I of the Indictment charged a conspiracy: (1) to defraud the stockholders and creditors of Pakco and Crescent, and the creditors from which petitioners borrowed, and (2) to defraud the SEC by making false statements and reports, committing perjury, suborning perjury and obstructing justice—all designed to conceal from the SEC the fraud practiced on the stockholders and creditors. The thrust of the government's case—as exemplified by its opening, the bulk of the evidence ad-

duced at trial and its summation—related to the alleged fraud on the shareholders and creditors.

However, at the close of the government's case, the court indicated its concern with the structure of the conspiracy count as framed by the grand jury. The trial judge characterized the conspiracy to defraud the SEC as "the basic conspiracy" and then said that he was bothered that the grand jury added "a scheme or artifice to defraud the stockholders and to commit mail fraud and wire fraud" (Tr. 6248). The former he regarded as the real conspiracy; the later, he felt, was just "tossed in" (Tr. 6311). The judge also indicated concern with the "*Grunewald* problem" [2] which permeated the conspiracy count as framed by the grand jury (Tr. 6249-50), a point strenuously pressed by the defendants in their motions to dismiss. In an attempt to avoid the strict evidentiary standards required by *Grunewald*, the court struck those paragraphs of the conspiracy count alleging fraud on the stockholders and creditors (Tr. 6250-51).[3]

After the conspiracy count had been restructured to fit the court's concept of the "basic conspiracy" and to eliminate what it believed to be just "tossed in", the defense moved to dismiss the entire conspiracy count, as restructured by the court, on the ground that it

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[2] See pp. 14-20, *infra*.

[3] The court struck paragraphs 6, 7 and 11a, 11b and 11c from Count I. These paragraphs consume about 25% of the length of the conspiracy count. Count I is reproduced in the Appendix 64a-73a; the portions removed by the trial judge are italicized.

was not the "indictment voted on by the grand jury" (Tr. 6325). That motion was denied. The court of appeals affirmed, holding that the amendment was not "prejudicial" (App. 10a).

By amending the indictment, the trial court deprived petitioners of their Fifth Amendment right to be tried on the charge returned by the grand jury. The court of appeals opinion affirming is directly contrary to the decisions of this Court.

In *Ex Parte Bain*, 121 U.S. 1 (1887) the indictment charged the defendant with making a false report "with intent to deceive the *Comptroller of the Currency* and the agent appointed to examine the affairs of said association." 121 U.S. at 4. The trial judge amended the indictment by striking the words "the Comptroller of the Currency and". He believed that the amendment was not prejudicial to the defendant and that the grand jury probably would have returned the indictment in the amended form. 121 U.S. at 9.

This Court reversed. It did not find that the defendant was prejudiced at trial by the amendment—nor did it embark on any such inquiry. The opinion criticized the trial court for amending the indictment "'to suit its own notions of what it ought to have been" 121 U.S. at 10, and for speculating as to what the grand jury might have done. The Court then held that the amendment was impermissible because the indictment was no longer that returned by the grand jury and it was impossible to tell whether the grand jury would have returned the indictment in the amended form.

The holding and the underlying philosophy of *Ex Parte Bain* were reaffirmed in *Russell* v. *United States*, 369 U.S. 749 (1962) where this Court reiterated:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure . . . This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." *Russell* v. *United States*, *supra* at 770.

The holding below that the amendment was permissible because petitioners were not prejudiced at trial is directly contrary to *Bain*. There was no conceivable prejudice to the defendant *Bain* and this Court did not even consider that question. Indeed it was irrelevant to the grounds of decision: that the Fifth Amendment entitles a defendant to an indictment returned by the grand jury and that once the indictment is returned the trial court may not amend it based on its speculation that the grand jury would have voted the indictment in the amended form.

The amendment in this case, designed to conform the indictment to the trial court's notions of what was "basic" and what was just "tossed in" and designed to eliminate evidentiary problems, drastically restruc-

tured the case against petitioners.[4] No one can say—and under *Bain* and *Russell* no one can speculate—whether the grand jury would have voted to return the indictment as amended below.

Despite the clarity of *Bain*, and its reaffirmation in *Russell*, there has developed a separate line of authority, followed by the court below, which holds—contrary to *Bain*—that unless the defendant can show he was prejudiced, the amendment is permissible. *Salinger* v. *United States*, 272 U.S. 542 (1926), generally cited in support of that proposition, was a mail fraud case in which the defendant moved to dismiss portions of the indictment at the close of the case on the ground that there was no evidence to support them. The trial court agreed and dismissed the unsupported portions. On appeal the defendant switched theories and argued that the trial court had impermissibly amended the indictment. Not surprisingly, this Court affirmed holding that where there is no evidence to support a charge and where the defendant

[4] Though not a point which would itself call for the granting of certiorari, it should be noted, for the sake of completeness, that amendment of the indictment did, in fact, seriously prejudice the petitioners. This resulted from the intermixture of proof of stock fraud—supposedly removed from the case—with proof of the conspiracy to conceal. Although the indictment was amended to remove a substantial portion of the charge after the government rested, not a single word of evidence was stricken, and the jury was never informed that the charge the prosecutor had outlined in his opening was not the charge they were to deliberate upon. Precisely the same circumstances led the court below, one year earlier, to reverse the convictions in *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970).

himself moves to strike portions of an indictment, there is no impermissible amendment.

Subsequent to *Salinger*, six courts of appeals have held that unless the defendant is prejudiced at trial, the indictment may be amended. *See Overstreet* v. *United States*, 321 F.2d 459 (5th Cir. 1963)[5] *cert. denied*, 376 U.S. 919 (1964); *Thomas* v. *United States*, 398 F.2d 531 (5th Cir. 1967); *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970); *United States* v. *Krepper*, 159 F.2d 958, 971 (3d Cir. 1946), *cert. denied*, 330 U.S. 824 (1947); *Vincent* v. *United States*, 337 F.2d 891 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965); *United States* v. *Denny*, 165 F.2d 668 (7th Cir. 1947)[6] *cert. denied*, 333 U.S. 844 (1948); *Bary* v. *United States*, 292 F.2d 53 (10th Cir. 1961.)

Those circuits are in direct conflict with *Bain* and the District of Columbia Circuit which recently held, in an exhaustive opinion:

> "Because the leading amendment case of *Ex Parte Bain* rested explicitly upon the Constitution, and because it apparently excludes any notion of a non-prejudicial amendment to the indictment, the concept of harmless error has not been applied to amendments." *Gaither* v. *United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969).

The Ninth Circuit joins the District of Columbia Circuit in applying the *Bain* rule strictly, without re-

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[5] Judge Brown, now Chief Judge of the Fifth Circuit, was in sharp dissent. 321 F.2d at 462-63.

[6] The amendment was approved over the dissent of then Judge, later Justice, Minton.

quiring a showing of prejudice. *E.g.*, *Stewart* v. *United States*, 12 F.2d 524 (9th Cir. 1926); *Carney* v. *United States*, 163 F.2d 784, 788-90 (9th Cir. 1947), *cert. denied*, 332 U.S. 824 (1947). The conflicting lines of authority recently led the Ninth Circuit to observe that "the progeny of *Bain* are out of joint." *Heisler* v. *United States*, 394 F.2d 692, 696 (9th Cir.), *cert. denied*, 393 U.S. 986 (1968).

This Court has not spoken to this important issue in a decade. The conflict among the circuits, the general confusion in the area and the frequency with which the issue arises are persuasive reasons for granting certiorari here.

2. As noted above, pp. 8-9 *supra*, after the government rested, the trial judge sought to eliminate the strict evidentiary standards required by *Grunewald* v. *United States*, 353 U.S. 391 (1957), simply by striking those paragraphs of the conspiracy count alleging fraud on the stockholders and creditors (Tr. 6250-51). Thus, as submitted to the jury, the conspiracy count centered on a conspiracy to defraud the SEC by concealing the corporate transactions through false statements, perjury, subornation of perjury and obstruction of the SEC proceeding. The government's proof of the conspiracy consisted exclusively of circumstantial evidence—essentially, the similarity of the alleged false statements—from which it asked the jury to infer an agreement to conceal. It is undisputed that there was no direct evidence of an agreement.[7]

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[7] The trial judge told the jury in his charge that "this is a circumstantial evidence case." (Tr. 7397) The court of appeals

To prove a conspiracy to commit perjury, the government read approximately one thousand pages of testimony given by the defendants at the SEC, which, taking the inferences most favorable to the government, indicate that the petitioners testified falsely about the corporate transactions essentially in a similar manner. As to the other objectives of the alleged conspiracy, the government's proof was even less probative as to existence of an agreement. Evidence of a single instance of attempted subornation, involving only one petitioner, was offered. As to that instance—an effort by Whorl to suborn one Harry Balterman—there was no proof that Colasurdo, or any other petitioner agreed to suborn or was even aware of what Whorl did. As to the charge of obstruction, again, proof was offered of only a single incident involving only one petitioner—this an alleged threat by Colasurdo to prevent Balterman from cross-examining Whorl concerning the preparation of SEC filings. Again, there was no proof that any other defendant agreed to obstruct or was even aware of the incident.[8] In short, whatever the evidence may have been as to the petitioners' own statements and con-

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noted that "there was direct evidence of *acts* of concealment" (16a), a fact neither in dispute nor, indeed, of any legal significance. On the critical question of whether there was direct evidence of an *agreement* to conceal, however, the court of appeals made no finding. Of course, its extended discussion of the *Grunewald* problem would have been unnecessary if it had believed that there was any direct evidence of agreement.

[8] It should be noted that there was doubt as to whether the alleged conversation was really meant as a threat. Balterman testified that he did not believe it or take it as such (Tr. 2960).

duct, there was no direct evidence of an agreement to conceal.

In the trial court and the court of appeals, petitioners argued that the evidence was insufficient because *Grunewald* v. *United States*, *supra*, requires direct evidence that the acts of concealment are undertaken pursuant to an agreement. In rejecting that argument, the court of appeals so limited *Grunewald* that the government may openly evade the important evidentiary standards articulated there and undercut the wholesome limitations which that case imposes upon the conspiracy doctrine.

Grunewald presented "a sordid picture of a ring engaged in the business of 'fixing' tax fraud cases by the use of bribes and improper influence." 353 U.S. at 394-95. When the defendants' efforts to fix the tax cases were about to be uncovered, they destroyed records, doctored reports and warned witnesses not to testify, all in a vain effort to escape detection. 353 U.S. at 395-96. At trial, the government argued that the conspiracy to "fix" tax cases included as one object an agreement among the conspirators to conceal their illegal activities in fixing the cases.* The Court characterized the case as:

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* The government made this argument in order to avoid a statute of limitations problem. The indictment was not returned within three years—the applicable period—of the fixing of the tax cases, but was returned within three years of the defendants' efforts to conceal their activities. Thus, to include as objects of the conspiracy the fixing of the cases, the government had to show that the conspiracy continued to within three years of the indictment. One way to do that was to allege that the efforts to conceal were part and parcel of the original conspiratorial agreement.

> "(1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light . . ." 353 U.S. at 403.

It then held that the evidence was insufficient to support the verdict because there was no direct evidence that the defendants' acts of concealment were undertaken pursuant to an agreement. Given an individual's natural inclination to avoid detection of illegal acts, it was just as likely, absent *direct* evidence to the contrary, that each individual acted on his own rather than pursuant to a conspiracy. 353 U.S. at 404. Thus, the gist of *Grunewald* is that even though there is evidence of a conspiracy to commit substantive crimes, and even though there is evidence that each of the conspirators attempted to conceal his part in the crime, the evidence is insufficient to prove that the acts of concealment are undertaken pursuant to a conspiracy, unless there is direct evidence of agreement.

The court below held that *Grunewald* did not apply here because concealment "was the very heart and object" and the "very aim" of the conspiracy for which petitioners were convicted.[10] We pointed out above

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[10] This factual finding by the court below illustrates an additional evasion of the strictures of *Grunewald* which requires that this issue be resolved by the jury. 353 U.S. at 406-15. This issue was never submitted to the jury which, indeed, was never even told that the "fraud on shareholders and creditors" portion of the conspiracy count had been withdrawn from them.

that, contrary to the court of appeals characterization, the indictment was drawn and the case tried as if concealment from the SEC was subsidiary to the charge that petitioners conspired to defraud the stockholders and creditors of Pakco and Crescent by using the assets of those corporations to enable Colasurdo to acquire control of Crescent.[11] While the proper characterization of the indictment may not be an issue of sufficient importance to warrant certiorari, there is an issue which meets the standard.

Under the court of appeals' holding, *Grunewald* will apply—with its high evidentiary standards—if an indictment charges defendants with conspiring to commit a substantive crime, such as arson, and then conspiring to conceal that crime by various means such as perjury, subornation and obstruction; however the strictures of *Grunewald* will not apply if those same defendants are charged only with conspiring to conceal the arson by perjury, subornation of perjury and obstruction of justice. Thus, in the case at bar the evidentiary standards of *Grunewald* would have applied had the petitioners been charged with conspiring to misuse corporate assets and then to conceal that misuse from the SEC, as indeed the grand jury's indictment charged. However, since under the court's view, the indictment did not allege misuse of corporate assets, but only a conspiracy to conceal the misuse of assets, the government was able to evade the require-

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[11] See Indictment, Count One, ¶¶ 6-7; 11(a)-(c) and the government's opening statement at Tr. 5-6, 11-13, 17-18, 21-23 and 25.

ment that there be direct proof of the conspiracy.[12] Apparently, under the holding below the result in *Grunewald* would have been different if the conspiracy count there had undergone surgery similar to that performed here so that the conspiracy count as submitted to the jury alleged only a conspiracy to conceal the fixing of the tax cases rather than a conspiracy to fix tax cases and to conceal those activities.

Thus, the decision below creates an arbitrary distinction between those cases to which *Grunewald* applies and those to which it does not.[13] To hold that *Grunewald* applies if the government charges a conspiracy to commit a crime and then conceal it, but that it does not apply if the only charge is one of conspiring to conceal, is a widening of the conspiracy doctrine at odds with the warning in *Grunewald* that this Court:

> "will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." 353 U.S. at 404 (footnote omitted).

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[12] Of course, although the scope of the charge was thus purportedly narrower, the range of proof permitted to the government was not, for the prosecutor was allowed to introduce evidence of the alleged misuse of corporate assets under the euphemistic heading of "background" to the conspiracy alleged.

[13] The court below assumed without citation of authority that independent acts of concealment are sufficient to support a conviction where concealment is the sole aim of the conspiracy. In fact, that issue was left open in *Grunewald*. See *Forman* v. *United States*, 361 U.S. 416, 421 n.5 (1960).

See also *Dutton* v. *Evans*, 400 U.S. 74, 82 (1970).[14]

Moreover, the decision below points the way for the prosecutor—or the court if it wants to restructure the indictment as was done here—to avoid *Grunewald* altogether merely by alleging a conspiracy which has concealment as its sole object and omitting any charge that the conspiracy encompassed an agreement to commit the substantive crimes sought to be concealed.[15]

The evidentiary standards articulated in *Grunewald* are important limitations on the far reaching conspiracy doctrine. The decision below, if not reversed, will nullify that decision and for that reason review is appropriate here.

3. In the certified financial statements to its Annual Report for 1965—filed on the SEC's Form 10-K—Crescent disclosed its purchase of the blueberry plantation and the terms of the purchase.[16] Count 26

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[14] Opinion of Mr. Justice Stewart joined by The Chief Justice and Justices White and Blackmun. There was no opinion for the Court.

[15] By this simple expedient of pleading, the government may multiply its accomplishments by also circumventing the salutary principles of *Bruton* v. *United States*, 391 U.S. 123 (1968) in which the Court held that the introduction of a co-defendant's extra-judicial statements at a joint trial posed a substantial threat to the other defendant's constitutional right of confrontation despite concededly clear limiting instructions to the jury.

[16] A footnote to the report stated:

"Subsequent to June 30, 1965, the company acquired the net assets of a land development and agriculture com-

charged that this Crescent report was false and misleading because it did not disclose that the transaction was with an affiliated corporation. The jury found Colasurdo guilty and he was sentenced to one year in jail on that count.

In affirming, the court of appeals totally ignored a major contention raised by Colasurdo: that he was denied due process of law because there was no requirement in the SEC statutes or regulations that Crescent disclose that the transaction was with an affiliated corporation and thus there was no warning that his conduct—the omission to note the affiliation —was illegal.

Since the alleged defect in the Crescent financial statement was an omission rather than an affirmative misstatement, the issue below was whether the financial statement was required affirmatively to describe the affiliation. That is not a simple question, as the proof at trial showed. An accountant called by the government testified that there was a split of opinion among accountants as to whether, in order accurately to describe a transaction, a financial statement must disclose affiliations between parties to the transaction. (Tr. 4682-85) One might expect that the SEC would require disclosure if it believed that such omissions would make financial statements false and misleading. Yet Regulation S-X (17 C.F.R. § 210.1-01 *et seq.*), an extremely detailed and complicated regu-

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pany for $600,000 cash, $1,900,000 5½% notes paid prior to December 31, 1965, and 125,000 shares of common stock."

lation which defines the accounting practices to be followed under all the acts administered by the SEC, does not require that corporate affiliations be disclosed in transactions such as that involved here. Proceeding further one discovers that:

—The statute, 15 U.S.C. § 78m, contains no such requirement.

—The SEC general rules and regulations contain no such requirement.

—Form 10K contains no such requirement.

—The instructions to Form 10K contain no such requirement.

The lack of any standard by which one could determine whether the disclosure was required was further underscored at trial by an SEC staff member called by the government to explain the SEC reporting requirements. When asked how one could tell, in filling out a Form 10-K, whether the reporting company has supplied enough information, he conceded that it was a matter of personal opinion (Tr. 1256).

Thus despite the fact that the SEC has, by regulation, defined the specific information required in a 10-K, and has defined the accounting practices to be used in preparing annual financials, it has not specified that financial statements must make a specific disclosure that a transaction is between affiliated corporations.

Neither the courts below nor the government were able to identify any standard, any statute, any rule or any regulation that put Colasurdo on notice that

his conduct was illegal. At trial the government contended that this "requirement" could be gleaned—not from statute, rule or form, but—from "generally accepted accounting principles." Yet as we noted above there is a split of opinion among accountants as to whether "generally accepted accounting principles" require that transactions among affiliates be disclosed.[17]

The trial court in instructing the jury failed to identify any standard by which to judge the financial statements. The judge said:

> "consider the evidence, study the footnote [that disclosed the transaction but did not say it was with an affiliated corporation] and the instructions and use your judgment and common sense and determine whether the government has proven beyond a reasonable doubt that the footnote was false and misleading. . . ." (Tr. 7388-89)

Under this instruction, the jury had license to judge the report on its own subjective judgment, unrestricted by any rule, regulation or statute. Apparently if the jury had been made up of a group of accountants who believe good accounting practices do not require disclosure, Colasurdo would have been acquitted. The

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[17] This case is quite different from *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969) *cert. denied* 397 U.S. 1006 (1970), relied upon by the court below. In that case it was held that the adherence to "generally accepted accounting principles" was no defense to a fraud charge. It is quite another thing, however, to say that non-compliance with such principles will subject one—a non-accountant at that—to criminal conviction.

jury sided with the group of accountants who take the opposite view. The crucial fact is, however, that the SEC rules did not take either side in the controversy among accountants; the rules had never warned that failure to disclose corporate affiliation makes a 10-K financial statement false and misleading and subjects the author to criminal conviction.

The court of appeals stated that the falsity of the financial statements was in the non-disclosure of pertinent facts *called for by the report* (App. 18a). (Emphasis added)[18] Yet the court was unable to point to any provision in the report or the regulations governing the content of the report that called for the omitted information.[19]

The decision below is not only unfair to Colasurdo for convicting him—and sending him to jail—for conduct no one had defined as criminal, but it leaves the

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[18] Filing of the textual portion of the 10-K was deferred by agreement with the SEC, and no statements or omissions in the textual portion formed any part of the charges contained in Count 26. While the court of appeals stated that one of the purposes of Form 10K is to disclose affiliation and "[T]he instructions so state" (App. 19a) the only such instructions relate *solely* to the textual portion, and thus have no bearing on Count 26.

[19] The court of appeals attempted to bolster its holding by finding that Colasurdo misled his accountants and that ultimately the question was one of good faith and honesty. (App. 19a-20a) Colasurdo denied that he misled his accountants, but whether he did or did not is irrelevant. The question is whether the financial statement made the disclosures required by the SEC rules and regulations and whether there was any warning that failure to disclose the corporate affiliation was criminal.

entire securities bar—which must counsel clients in filing their reports [20] without any ascertainable standard as to what, if anything, must be disclosed in addition to the specific disclosures required by SEC statutes and regulations. This Court has been vigilent in protecting individuals against criminal convictions where they had no prior notice that their conduct would be illegal. *E.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195 (1966); *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966); *United States* v. *Cardiff*, 344 U.S. 174 (1952); *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927).

The SEC could easily have required by rule or regulation the disclosures omitted here. Perhaps it could even have justified civil proceedings against petitioners. But to prosecute an individual and send him to jail for failing to disclose information which the SEC rules have *never* specified must be reported is a deprivation of fundamental due process deserving of this Court's review.

4. This Court now has under submission cases raising issues as to the limitations on the pervasive investigatory powers of the grand jury.[21] This case

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[20] In 1970 over 24,000 periodic reports were filed with the SEC. See 36th Annual Report of the Securities and Exchange Commission.

[21] *Kastigar* v. *United States*, No. 70-117; *United States* v. *Caldwell*, No. 70-57; *In re Pappas*, No. 70-94; *Branzburg* v. *Hayes*, No. 70-85; *See also Gelbard* v. *United States*, No. 71-110

presents an issue no less important—whether a defendant has any remedy if a grand jury acts on evidence obtained in violation of his attorney-client privilege.

In 1966 the SEC conducted a private investigation of the financing of the acquisition of Crescent stock. It continued in January 1967 with a formal administrative proceeding. Pakco and Crescent were represented in those proceedings by separate counsel and petitioners had still additional attorneys. All of the attorneys functioned as part of the "defense team". The administrative proceedings were extensive, resulting in thousands of pages of testimony and hundreds of exhibits.

Following the termination of the SEC proceedings, the United States Attorney began an investigation of the very same matters which were the subject of the SEC proceedings. It was this investigation which resulted in the present indictment. The government called before the grand jury the lawyer who had represented Pakco, two lawyers who had represented petitioners, and the lawyer who had represented Crescent was interviewed by the prosecution staff.[22]

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cert. granted, 40 U.S.L.W. 3279 (Dec. 14, 1971); *United States* v. *Egan*, No. 71-263, *cert. granted*, 40 U.S.L.W. 3279 (Dec. 14, 1971).

[22] Although Crescent's attorney did not testify before the grand jury, the information obtained from him may have been put before the grand jury (see *e.g.*, *United States* v. *Arcuri*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969)). A ruling at trial that his proposed testimony would violate the attorney-client privilege led the prosecution to concede that it had no proof to support a portion of the charge. See note 26 *infra*.

Prior to trial petitioners moved for a hearing to ascertain whether the grand jury considered evidence obtained in violation of their attorney-client privilege. Although the government did not deny that evidence obtained in violation of the privilege had been presented to the grand jury, the trial court refused to order a hearing. The court of appeals affirmed holding that "even if correct, appellants' assertions would not be grounds for dismissing the indictment. *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Lawn* v. *United States*, 355 U.S. 339, 348-50 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956)."

The sweeping dicta in those cases have been taken by lower courts automatically to shield any form of grand jury abuse from review. See, *e.g.*, *United States* v. *DeLeo*, 422 F.2d 487, 496-97 (5th Cir.), *cert. denied*, 397 U.S. 1037 (1970) (use of perjured testimony); *United States* v. *Johnson*, 419 F.2d 56, 58 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970) (evidence obtained in violation of the Constitution); *Tarvestad* v. *United States*, 418 F.2d 1043, 1049 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (use of defendant's own testimony in violation of the 5th Amendment); *Reyes* v. *United States*, 417 F.2d 916, 918-19 (9th Cir. 1969) (inadequate evidence). Yet while the language of *Costello*, *Lawn* and *Blue* can be read to foreclose inquiry as to whether evidence before a grand jury was obtained in violation of a defendant's privilege, the holdings of

those cases do not bar such inquiry.[22] Moreover this Court has suggested that there are limitations on the language of *Costello*. *Coppedge* v. *United States*, 369 U.S. 438, 453 (1962), indicated that *Costello* was not dispositive of the claim that an indictment was based on perjured testimony. Thus, the lower court's rigid reading of *Costello*, *Lawn* and *Blue* as foreclosing any inquiry into whether the grand jury acted on privileged evidence is unwarranted.

The facts here demonstrate how the holding below threatens the attorney-client privilege. The United States Attorney's office was investigating, among other things, what it considered to be acts of concealment committed during the course of lengthy SEC proceedings in which the petitioners' attorneys were actively participating as defense counsel. In at least one instance, the government proceeded on the theory that the lawyers participated, albeit unknowingly, in the fraud by transmitting to the SEC offers of settle-

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[22] *Costello* held that an indictment based on hearsay evidence was not defective for that reason.

In *Lawn* the refusal to grant a pretrial hearing was affirmed on the basis of an affidavit from the United States Attorney stating unequivocally that the grand jury had not considered tainted evidence.

In *Blue* this Court held that the possibility that the government might attempt at trial to use evidence obtained in violation of the Fifth Amendment did not justify dismissal of the indictment. The defendant did not contend that the grand jury considered the tainted evidence 384 U.S. at 255 n.3 and thus the proper remedy if the grand jury had acted on that evidence was not at issue.

ment which the grand jury charged were false.[24] The lawyers were presumably involved in helping their clients prepare for testimony, which the grand jury and the United States Attorney's Office later charged was untrue. Thus, when interviewed and when testifying before the grand jury the lawyers were placed in a delicate position where their personal interests conflicted sharply with their obligation to protect the confidences of their clients.[25] In such circumstances, the pressure to avoid any personal problem draws the attorney irresistably in the direction of revealing the confidences of his client.

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[24] At trial the government agreed to strike the allegations referring to false offers of settlement after the court said it had serious problems with those allegations because only through the testimony of attorneys could the government prove that the defendants were responsible for the false statements. (Tr. 5592-5597). Presumably, the government introduced the same privileged material before the grand jury.

[25] The almost natural invitation to violate the privilege in these circumstances becomes apparent from the testimony of one of the attorneys who testified for the government. He testified that he emerged "completely shell-shocked" (Tr. 2966) from his first interview with the U. S. Attorney. He conceded that at the time of his grand jury appearance he was concerned that he might be indicted (Tr. 2602, 2993-95), and that by testifying before the grand jury, he hoped he would not be indicted (Tr. 2997). Indeed, if he did not violate the privilege during his tesitmony before the grand jury it was not the result of his assiduous concern for his former client's confidences. On at least one occasion before the grand jury he stated he would testify about conversations with Colasurdo regardless of whether he was right or wrong as to whether the privilege had been waived as to those conversations (GX 3558).

It is an abuse of the grand jury process to interrogate an attorney in such a way as to require him to violate the attorney-client privilege in order to exculpate himself.[26] If the prosecutor may engage in that practice with impunity, the privilege will be threatened and there will be a serious obstruction to the free flow of communication between lawyer and client. The court suggests in *Caldwell* v. *United*

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[26] One example best illustrates the likelihood that the grand jury acted on the basis of evidence obtained in violation of the privilege. The indictment alleged that Whorl and Colasurdo lied to the SEC when they denied having previously seen a memorandum of a conversation between Whorl and Ronald Baldwin of Price, Waterhouse. At trial, in order to prove that the defendants had seen the memorandum prior to the time they told the SEC, the government proposed to call Bondy and Jackson, the attorneys who had represented Pakco and Crescent in the SEC proceedings. The judge conducted a hearing out of the presence of the jury to determine whether it would violate the attorney-client privilege for those lawyers to testify as to when they, and the petitioners, first saw the Baldwin memorandum. Bondy related the circumstances of a meeting between the defense team of attorneys for the SEC proceedings and their clients at which he was shown the Baldwin memorandum. At the conclusion of his testimony, the trial judge sustained the claim of attorney-client privilege (Tr. 4835) and held that neither Bondy nor Jackson would be permitted to testify on that point.

The prosecutor then conceded that "We are stuck with a situation where the attorney-client privilege has taken away all the witnesses that can prove this part of the fraud." (Tr. 4837). Thus, if there was any evidence before the grand jury to sustain the perjury counts and those parts of the conspiracy count alleging perjury, it must have come either from Jackson, who testified before the grand jury and conferred with the United States Attorney's office, or from Bondy, who was interviewed by members of the prosecution team.

States, 434 F.2d 1081 (9th Cir. 1970) *cert. granted* 402 U. S. 942 (1971), that grand jury testimony by a newspaper reporter may "chill" relations between the reporter and his sources; if that be so, the holding below may "freeze" free exchange between lawyer and client.

The court of appeals' holding is an unwarranted extension of this Court's decisions which, if not corrected, will permit serious erosions of a fundamental privilege recognized as essential to the "proper functioning of the legal system . . . ." [27] Thus the question of whether a grand jury is free to obtain and act on privileged information is an important question of federal law which has not been, but should be, resolved by this Court, since, as the opinion below reveals, lower courts may feel that the language of this Court's prior decisions bar such inquiry.[28]

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[27] Canon 4 of the American Bar Association Code of Responsibility provides in part:

> "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him."

[28] The court of appeals' fear that if a pretrial hearing were granted there would always be a "preliminary trial to determine the competency or adequacy of the evidence before the grand jury with resultant delay" is probably unjustified. See Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590 (1963).

CONCLUSION

For the foregoing reasons petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1972

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1085-6-7-8—September Term, 1970

(Argued July 13, 1971 Decided December 6, 1971)

Docket Nos. 71-1373-4-5-6

UNITED STATES OF AMERICA, APPELLEE

v.

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL, APPELLANTS

Before FRIENDLY, *Chief Judge*, LUMBARD and OAKES, *Circuit Judges*.

Appeal from judgment and sentence following conviction on trial to the jury in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, on charges of conspiracy in violation of 18 U.S.C. § 371 and of filing false reports with the SEC and the Stock Exchange in violation of 15 U.S.C. §§ 78m, 78ff(a) and 18 U.S.C. § 2.

Affirmed.

Paul R. Connolly, Morrison, Paul & Beiley, New York, New York (Edward Bennett Williams, Peter H. Morrison, John Vardaman, Jr., Myron J. Greene and Elkan Abramowitz, of counsel), for appellant Colasurdo.

Charles A. Stillman, Botein, Hays, Sklar & Herzberg, New York, New York, for appellants McLaney, Cipo and Whorl.

H. Thomas Coghill, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Jack Kaplan, John A. Lowe, Barbara A. Rowan, James P. Tierney, and Peter F. Rient, Assistant United States Attorneys, of counsel), for appellee.

OAKES, *Circuit Judge:*

This very complex, exceptionally well presented appeal raises a series of questions—going both to the conspiracy and the substantive counts—that requires, as did *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970), a rather extensive recital of the facts. This recital is especially necessary to understand the *Wolfson* and *Grunewald*[1] points made by appellants in this SEC case, which took 12 weeks to try, with over 50 witnesses and 700 documentary exhibits, a correspondingly extensive record, and briefs on appeal.

In essence, the case involves Lewis Colasurdo and certain of his associates who used an asset of Pakco Companies, Inc. ("Pakco"), an over-the-counter company, to purchase two blocks of stock—a controlling interest—of Crescent Corporation ("Crescent"), a company listed on the New York Stock Exchange. The resultant criminal charges involve concealment from the Securities and Exchange Commission of that purchase, the concealment being effectuated by a se-

[1] *Grunewald* v. *United States*, 353 U.S. 391 (1957).

ries of sham transactions followed by false reports, statements and testimony to and before the SEC, and other attempts to obstruct "private" and "public" SEC investigations.

The Pakco asset used was a 2500 acre blueberry plantation located in Atlantic County, New Jersey. Acquired originally from appellant Colasurdo at the time of Pakco's organization, the plantation was carried on the books of Pakco at one dollar although it was appraised in 1961 at $2.5 million. Appellant Colasurdo, who with his two brothers owned approximately 42 per cent of this publicly held corporation, also was its president until June 1965, when he assumed control of and became president of Crescent. Pakco's and subsequently Crescent's vice president was one Bronsen, a fugitive from justice and not an appellant here. Pakco's controller, and subsequently Crescent's treasurer, was appellant Whorl. Appellants Cipo and McLaney were neither officers nor directors of Pakco or Crescent but were participants in some of the transactions by which the Pakco plantation ultimately became an asset of Crescent's and by means of which a controlling interest in Crescent was acquired by appellant Colasurdo.

The control of Crescent was obtained by the purchase of two large blocks of Crescent stock. The first was the Floersheimer block, consisting of 436,400 shares, which was sold to ALCA Industries, Inc. ("ALCA"), a corporation solely owned by Colasurdo and formed for that purpose. The second was the Mencher block, consisting of 125,000 shares, which was sold to BLCB Industries, Inc., a corporation owned by Bronsen and formed for that purpose. ALCA's purchase price for the Floersheimer block was $15 per share or $6,546,000, one-third to be paid

at closing, June 18, 1965; one-third in June 1966; and one-third in June 1967. BLCB's purchase price for the Mencher block was also $15 per share or $1,875,000, payable $1,005,000 on the same closing date, June 18, 1965, and the balance in three equal promissory notes of $290,000 each, payable at six month intervals thereafter. Financing of the ALCA down payment was obtained by ALCA's borrowing $218,200 from Pakco and the balance of $1,963,800 from the First Pennsylvania Bank and Trust Company. The bank's loan was secured by Colasurdo's personal guarantee and by escrow arrangements involving both ALCA stock and the Crescent stock acquired. Financing of the BLCB acquisition was by way of a $100,000 loan to Bronsen by Pakco, a $900,000 loan by the Franklin National Bank to Bronsen guaranteed by Colasurdo and further secured by the Crescent stock acquired, and the guarantee by Colasurdo and his wife of the three notes of BLCB due for the purchase price.

The Pakco asset, the blueberry patch, then became the center of the following transactions. Its sale to one Charles E. Meyers, or his nominee, for $3,850,000 was authorized by the Pakco board on May 19, 1965, with $500,000 to be paid for the blueberry crop in cash by December 1, 1965, and a five year installment note ($670,000 each installment) being taken for the $3,350,000 balance on the land. The sale was to be *without security* to Pakco except for a guarantee on the note by appellant McLaney. On May 31, 1965, the sales agreement was entered into and Meyers assigned his right to purchase to appellant McLaney. McLaney took title in the name of Caletta Blueberry Co., Inc ("Caletta")—a corporation formed August 6, 1965, for the purpose of the acquisition—on Au-

gust 9, 1965, by deed recorded on September 23, 1965. Appellant Whorl (who it will be remembered was Pakco's controller) was secretary-treasurer of Caletta.

But Caletta was not to hold title to the popular, if ubiquitous, blueberry plantation for long. Rather, by agreement dated August 31, 1965, it was sold to Makepeace, Inc. The sales price was $3.9 million, with $500,000 to be paid one day before the first Meyers payment of the same amount to Pakco was due, and the balance on five equal installments of $680,000 payable three months before and in a sum $10,000 greater than the McLaney guaranteed note to Pakco. The deed *from* Caletta was recorded on the same day, September 23, 1965, as the deed *to* Caletta. Makepeace, Inc., it may be noted, was wholly owned by appellant Cipo, a former employee of a Pakco subsidiary. The same attorney, Israel Finkelstein, who was a Philadelphia collection attorney for Pakco, formed Caletta *and* formed Makepeace, Inc., reserving the latter's corporate name on June 8, 1965, and incorporating it on July 21, 1965, before Caletta's date of corporate birth. Colasurdo, who was by June 29, 1965, president and firmly installed in control of Crescent (constituting with Bronsen, appellant Whorl and another nominee four of Crescent's seven directors), commenced "negotiating" with Makepeace for the sale of the blueberry plantation to Crescent. The "negotiation" was quickly consummated; Crescent agreed, on September 15, 1965, to pay Makepeace $4 million, consisting of $600,000 in cash, 125,000 shares of Crescent stock valued at $1.5 million, and an installment promissory note for $1.9 million with a right of prepayment by Crescent. Attorney Finkelstein represented Makepeace at the closing, which took

place (subject to escrow for title clearance) on September 25, 1965—two days after the recording date for the deeds to Caletta and Makepeace. Crescent then prepaid the $1.9 million note. Makepeace in turn paid $500,000 to Caletta which paid it to Pakco. The balance of $2 million which Makepeace now had as cash was transferred to an account of Delaware & New Jersey Properties, Inc. ("Delaware & New Jersey"), a corporation formed by Bronsen, which transferred the funds to ALCA (Colasurdo's Crescent stock acquisition company) which paid its indebtedness to First Pennsylvania.

The Makepeace-to-Delaware & New Jersey-to-ALCA transaction was explained by appellant Colasurdo as the proceeds of a loan to him from Six M's Ltd., a Bahamian corporation headed by the lawyer-Premier Lyndon O. Pindling, who—because he is said to have said he did not want to take $2 million out of the United States (having just sold a $2 million debenture of Makepeace to Cipo) and bring it back again—was willing to take an assignment of Bronsen's interest in Delaware & New Jersey so as to facilitate the loan to Colasurdo.

Ultimately, in March and April of 1967, Pakco acquired the ALCA and BLCB Crescent stock from those corporations and the 125,000 shares of Crescent held by Caletta (thereby reducing Caletta's obligations to Pakco) and thereby had a controlling interest in Crescent. This Pakco subsequently sold for a profit of over $1.6 million.

In sum, by concealing the fact that Pakco was actually selling the blueberry plantation to Crescent, Colasurdo was able to gain control of Crescent by the use of Crescent's own money. Moreover, because

Crescent made immediate payment of its obligation to Makepeace, Colasurdo was able to use the $2 million received from Crescent to repay ALCA's loan from First Pennsylvania. Meanwhile it would be five years before Caletta would have to repay Pakco. Additionally, because each dummy corporation made a profit on each of the "sales," McLaney and Cipo each realized a substantial sum from their participation in the scheme.

Commencing in July 1965, Crescent filed with the SEC and New York Stock Exchange its Form 8-k and 10-k reports. The 8-k Report for June 1965, prepared and signed by appellant Whorl, stated:

> On June 18, 1965, Alca Industries Corporation acquired in a private transaction 436,400 shares of the registrants [sic] common stock constituting 28% of the outstanding shares in this class and 25% of all outstanding voting stock.

This report did not refer to Colasurdo's ownership of ALCA or BLCB's purchase. (It was the subject of Count 22, charging false and misleading statements to the SEC, on which Colasurdo and Whorl were found guilty.)

Crescent's Form 8-k Report for September 1965, likewise prepared and signed by Whorl, stated

> 125,000 shares of treasury stock valued at $12.00 per share were issued in exchange for land, buildings, machinery and equipment,

but did not mention that the lands, et cetera, were the Pakco blueberry plantation, Colasurdo's control of Pakco or the paying of $1.9 million in a note and $600,000 in cash to Makepeace. (The report was the subject of Count 23 of the indictment, of which Colasurdo and Whorl were also found guilty.)

The Form 10-k financial part of Crescent's 1965 annual report stated

> Subsequent to June 30, 1965, the company acquired the net assets of a land development and agriculture company for $600,000 cash, $1,900,000 5½% notes paid prior to December 31, 1965, and 125,000 shares of common stock,

but did not disclose that the assets were purchased from Pakco, Crescent's affiliate, or Colasurdo's interest in the transaction. (It was the subject of Count 26 of the indictment on which Colasurdo was found guilty and Whorl not guilty.)

The accompanying narrative report, filed with the SEC on Form 8, similarly failed to disclose the plantation purchase was with an affiliate and that Colasurdo had an interest in it. (It was the subject of Count 27 of the indictment on which Colasurdo was found guilty and Whorl not guilty.)

Following an SEC investigation, which included a private proceeding where testimony was given by appellants Colasurdo, Cipo, Whorl and McLaney, the Government sought and obtained a 45-count indictment against appellants, as well as against Bronsen, Finkelstein and five others. Bronsen was, as we have said, a fugitive at time of trial and Attorney Finkelstein was dead. Count One charged all defendants with conspiracy to defraud the SEC and to commit certain offenses against the United States and all appellants were convicted on it; it is the main object of this appeal. Counts 2 through 19, charging wire and mail fraud, were severed, and Counts 20 and 21 were dismissed, on the court's own motion, as were Counts 24 and 28. Counts 22, 23, 26 and 27 were the false filing counts above referred to, as was Count 25 on

which both Colasurdo and Whorl were found not guilty. Counts 29 through 45, charging perjury, false statements before the SEC and obstruction of justice, were severed by the court prior to trial.

Thus, as the case went to the jury, all appellants were charged with conspiracy (Count One),[2] and appellants Colasurdo and Whorl with false filings on five counts (Counts 22, 23, 25, 26 and 27).

With the foregoing barebone skeleton of the facts underlying this appeal, we turn to appellants' first and major contention—that the conspiracy count was improperly amended by the court below in violation of appellants' constitutional rights, so as to require dismissal under *Ex parte Bain*, 121 U.S. 1 (1887), and *Russell* v. *United States*, 369 U.S. 749 (1962), or, alternatively, that the court erred in omitting to instruct the jury that allegations of fraud on the stockholders and creditors of Pakco and Crescent were being removed from the case, so as to require a new trial under *United States* v. *Wolfson*, *supra*.

Count One, to detail it more, charged appellants (and others) with conspiracy to defraud the United States and the SEC [3] and to commit against the United

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[2] Three individual defendants including one of Colasurdo's brothers were acquitted on Count One, and the court dismissed as to appellant Cipo on two of the false filing counts, 26 and 27. Each defendant was fined $10,000 on each count on which he was convicted. Colasurdo was sentenced to two years' imprisonment on Count One and one year on Count 26, the terms to be concurrent. Whorl and McLaney were each sentenced to one year's imprisonment on Count One but McLaney's sentence was suspended.

[3] And to violate 15 U.S.C. §§ 78m, 78ff(a); 18 U.S.C. §§ 1341, 1343, 1505, 1621 and 1622.

States violations of 15 U.S.C. § 78m (prohibiting, *inter alia*, acquisitions of issuers' securities without disclosure of "the background and identity" of persons on whose behalf acquisition has been made); 15 U.S.C. § 78ff(a) (penalizing false or misleading filings); and 18 U.S.C. §§ 1001 (fraud on United States agency), 1341 (mail fraud), 1343 (wire fraud) 1505 (obstruction of justice), 1621 and 1622 (perjury). Nine parts of the conspiracy were alleged: (1) submitting to the SEC false offers of settlement, a part struck by agreement of counsel; (2) making false statements in an SEC matter; (3) making false statements in reports filed with the New York Stock Exchange and the SEC; (4) failing to file reports required by 15 U.S.C. § 78m; (5) and (6), defrauding the stockholders and creditors of Pakco and Crescent and using the mails (5) and wire (6) to execute the fraud; (7) obstructing justice in SEC proceedings; (8) committing perjury before the SEC; and (9) suborning perjury.

The trial court was concerned with the "Grunewald problem." *Grunewald*, note 1 *supra*. In that case the Supreme Court held that absent direct evidence of agreement, acts of concealment in and of themselves are insufficient to sustain a conviction for conspiracy to conceal. Judge Bonsal struck that portion of the conspiracy count [parts (5) and (6)] relating to fraud on the stockholders and creditors of Crescent and Pakco, but denied a motion to dismiss the entire conspiracy count. We do not think this was prejudicial, since the elimination of the supporting allegations of the fraud on creditors and stockholders narrowed, rather than broadened, the reach of the conspiracy count. *Salinger* v. *United States*, 272 U.S. 542, 548-49 (1926); *New England Enterprises, Inc.*

v. *United States*, 400 F.2d 58, 62 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969); *Overstreet* v. *United States*, 321 F.2d 459, 461 (5th Cir. 1963), *cert. denied*, 376 U.S. 919 (1964).

In *Ex parte Bain*, 121 U.S. 1 (1887), there was an actual physical amendment of the indictment. There the indictment contained a single count, for bank fraud, in which an integral facet was the statement that the defendants had acted with intent to deceive the Comptroller of the Currency. Without resubmission to a grand jury, the trial court struck the reference to the Comptroller as surplusage; but in the context of the particular indictment the Court concluded that it was "not impossible nor very improbable that the grand jury looked mainly to [the Comptroller] as the party whom the prisoner intended to deceive. . . ." 121 U.S. at 10. In short, the Court found that the trial court's action had worked a fundamental change in the charge set forth in the indictment. Here, however, as in *Salinger*, *supra*, whether the trial court was right or wrong in narrowing the charge—as to which we also intimate no opinion—the trial was on the main charge preferred (here a scheme to commit fraud on the SEC) and the portion of the manifold scheme ordered stricken was unnecessary to the commission of the basic fraud charged. *See also Thomas* v. *United States*, 398 F.2d 531, 537 n.10 (5th Cir. 1967); *Overstreet* v. *United States*, *supra*. The reason for the withdrawal of a part of a charge is to us immaterial. *Cf. United States* v. *Wolfson*, *supra* at 873 (reason, legal insufficiency); *Overstreet* v. *United States*, *supra* (reason, crimes, the perpetration of which was charged as objective of conspiracy, carried different sentences).

Russell v. *United States*, 369 U.S. 749 (1962), relied upon by appellants, is not to the contrary; there, an indictment charging perjury in several particulars was held insufficient to apprise the defendant of the charges against him because it failed to allege what was the subject of inquiry, vitally necessary to the issue of materiality. The Court there recognized that amendments of "form" as opposed to substance are permissible, stating that ". . . an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." 369 U.S. at 770. *Stirone* v. *United States*, 361 U.S. 212 (1960), is also inapposite since there the indictment alleged interference by extortion with the *importation* into Pennsylvania of sand to be used in building a new plant, but the trial court permitted the case to go to the jury on evidence concerning interference with the *exportation* from Pennsylvania of steel to be manufactured in the new plant. That is, the specific charges in the indictment were enlarged by the trial court in a material way.

The other string to appellants' bow is the claim that even if the trial court properly removed the allegations of stockholder and creditor fraud from the jury's consideration, it should have given appellants a new trial, because evidence pertaining to fraud on the stockholders and creditors had been admitted. In support of this point, appellants argue at length and in depth the similarities of this case and *United States* v. *Wolfson*, *supra*. But in *Wolfson* the alleged fraud on stockholders was the first item of the conspiracy allegations; the first seven means by which the conspiracy was carried out stressed such fraud, as did the Government's opening statement; and the court did not advise the jury immediately of the limitations

on the charges after striking the stockholders fraud allegations. Here, however, the evidence relating to the blueberry plantation transfers was background only.[4] The indictment was not read to the jury. The Government's opening made so little of the fraud on stockholders that the defendants themselves moved to dismiss that part of the indictment on the basis of the opening. When the trial court limited the indictment at the close of the Government's case, it promptly instructed the jury that it would not have to consider the counts of mail fraud,[5] and spelled out that the conspiracy charge was one to defraud the United States and the SEC by concealment, filing false statements, committing and suborning perjury, and so forth.[6]

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[4] As such it was properly admitted and the motion to strike it was properly denied. *United States* v. *Abrams*, 357 F. 2d 539, 546 (2d Cir.), *cert. denied*, 384 U.S. 1001 (1966); *United States* v. *Guterma*, 281 F. 2d 742, 746 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960).

[5] Appellants claim the court was referring solely to the mail fraud counts (2-21). But since as a part of the conspiracy fraud on stockholders and creditors was alleged to be by mail and wire, the reference to mail fraud could properly be read to refer to the conspiracy count. And only confusion would have ensued since the court was not striking the evidence of the blueberry plantation transfers and Crescent stock purchase manipulations. That evidence was properly admissible on the basic conspiracy charge—to defraud the United States and SEC by concealing the transactions.

[6] The indictment charges a conspiracy; it charges the defendants with conspiring together to defraud the United States and the Securities and Exchange Commission by concealing material facts concerning the transactions between Pakco and Crescent involving, you remember, the Caletta Blueberry, Makepeace, and these

Appellants further contend that there was insufficient evidence to support a conviction under the conspiracy count in that there was no direct evidence of an agreement to conspire to defraud the SEC. They rely upon *Grunewald* v. *United States*, *supra*, *Krulewitch* v. *United States*, 336 U.S. 440 (1949), and *United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960). These cases stand for the proposition that "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." *Grunewald*, *supra* at 402. But here of course the concealment was the essence of the object of the conspiracy—concealment from the SEC of the use of a Pakco asset to accomplish the Crescent takeover was the very aim of the sham transactions in which the conspirators engaged. Filing false statements with, and submitting false testimony to, the SEC were means of furthering that aim, since both Pakco and Crescent were publicly owned and required to disclose to the SEC transactions such as were engaged in here.

Colasurdo and Whorl were involved from the beginning. They engineered the plantation transactions

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other people about whom we have heard testimony here during this long trial.

The indictment charges—and again I repeat it, it is only a charge—the conspiracy was carried out by the filing of false statements with the Securities and Exchange Commission, by the commission of perjury before the Securities and Exchange Commission and by urging others to commit perjury, and by endeavoring to obstruct justice, that means endeavoring to obstruct the Securities and Exchange Commission in the performance of the Commission's duties.

so as to avoid making it appear to the SEC that Crescent's money to purchase the blueberry plantation was really being used by Colasurdo to buy Crescent stock. Caletta and Makepeace were simple conduits, shams to make it appear that the sales were at arm's length. McLaney and Cipo were front men for the conduit corporations; they each incidentally made a tidy sum without putting up any money or using their own credit. Cipo falsely told Mr. Balterman, Crescent's SEC attorney, that he, Cipo, was in no way affiliated with Colasurdo at the Crescent-Makepeace closing on September 25, 1965. McLaney's corporation, Caletta, had a corporate address that was a Philadelphia auto showroom operated by a client of the Pakco-Caletta-Makepeace lawyer, Finkelstein. Cipo falsely testified in the first SEC investigation that he had no connection with Colasurdo except through the sale of the plantation to Crescent and that he used the $1.9 million prepayment of Crescent in his other businesses. He subsequently swore that Makepeace was going to invest the $1.9 million in a convertible debenture of Six M's Ltd., the Bahamian corporation, and that when he heard of Colasurdo's desire to borrow $2 million from Six M's, he put Colasurdo in touch with Pindling, the president of Six M's.

But there was evidence that on October 5, 1965, when appellant Colasurdo swore (in an affidavit filed with the SEC on August 22, 1966), that he through Cipo borrowed $2 million from Six M's, Six M's was merely a corporate shell; its articles of association were dated September 28, 1965, and filed in Nassau on October 1, 1965. There was evidence, moreover, that the papers purporting to constitute an assignment by Bronsen of the Delaware & New Jersey

Properties, Inc., to Six M's, as well as the debenture transaction with Makepeace and the loan to Colasurdo, had been fabricated and backdated. Six M's was struck by the Registrar General of the Bahamas as a defunct corporation on April 3, 1967. Cipo as the Makepeace front and the introducer of Colasurdo to Six M's was an active participant in the overall deceit; it was vital to keep Crescent's SEC attorney, Balterman, from knowing what was going on and Cipo, it will be remembered, was the one who told Balterman that he was in no way affiliated with Colasurdo. The instruments effectuating the transfer of the plantation to Crescent were signed by Cipo for Makepeace and by Bronsen for Crescent. McLaney, as the front for Caletta, was aware of the sham in which he was engaged. He participated in the plantation transfers which were to conceal the basic transaction from the SEC. He signed a guarantee of all Meyers' liability in connection with the sale of the plantation by Pakco to Meyers, which was a keystone of the basic transaction, since the absence of a Pakco mortgage on the plantation was ultimately what enabled Colasurdo to use Crescent money to finance the purchase of Crescent stock.

In other words, there was direct evidence of acts of concealment of a continuing conspiracy in which concealment was not only essential to the success of the scheme but was the very heart and object of it. *Forman* v. *United States*, 361 U.S. 416, 421-22 n.5 (1960). We read *Grunewald*, *supra*, *Lutwak* v. *United States*, 344 U.S. 604 (1953), and *Krulewitch*, *supra*, as did the Supreme Court in *Ingram* v. *United States*, 360 U.S. 672, 679 n.10 (1959):

> The Court's decisions in *Grunewald* v. *United States*, *Lutwak* v. *United States*, and *Krulewitch*

> v. *United States*, do not, as petitioners appear to contend, prevent the jury from treating this subsidiary objective [secrecy] as an element of the conspiracy. Those cases hold only that the life of the conspiracy cannot be extended by evidence of concealment after the conspiracy's criminal objectives have been fully accomplished. (Citations omitted.)

Here, unlike *United States* v. *Bufalino*, 285 F.2d 408 (2d Cir. 1960), the statements and acts of the appellants were similar in that they each attempted to convey to the SEC that Pakco-Crescent acquisition transactions were in each instance at arm's length and good faith business dealings, not shams to keep the SEC from discovery of the true acquirer, the true means of acquisition and the true facts surrounding the acquisition. In the Form 8-k and 10-k Crescent reports, Colasurdo and Whorl disclosed enough to mislead the SEC with half-truths and concealed the key facts underlying the transactions (Colasurdo's ownership of ALCA, BLCB's purchase, involvement of the Pakco blueberry plantation, the purchase of the blueberry plantation from Pakco and Colasurdo's interest in the transaction).

Furthermore, there was evidence that Colasurdo said to Balterman during the public SEC proceedings when Balterman was about to cross-examine Whorl (to establish that Whorl had not consulted with counsel prior to filing these reports), "If you open your— if you examine him, you won't live long enough to see your wife and children again." Earlier Whorl had asked Balterman to destroy documents linking Makepeace and Finkelstein and not to mention Finkelstein, whose participation as attorney for Caletta and Makepeace was known to Cipo and McLaney also. (Cipo

did not mention Finkelstein when he testified in the SEC "private" proceedings on who was present at the Makepeace-Crescent closing.) The charge was correct and appropriate:

> In determining whether the conspiracy charged existed, you should consider the evidence with respect to the acts, declarations and conduct of the alleged conspirators as a whole and the reasonable inferences you find may be drawn from the evidence.
>
> Mere similarity of conduct among the alleged co-conspirators, or the fact that they may have associated with each other, or that two or more of them may have discussed together common aims and interests, does not by itself establish that there was a conspiracy.

There was sufficient evidence to warrant conviction of Colasurdo and Whorl on the substantive counts relating to Crescent's filing of false Form 8-k and 10-k reports. The falsity lies in the non-disclosure of pertinent facts called for by the report. *Cf. United States* v. *Rao*, 394 F.2d 354, 356-57 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968). The first item of information to be included in a Form 8-k report is a change in control of a registrant, and the June 1965 form filed here indicated only acquisition by ALCA, not BLCB or the true "parent," Colasurdo.[7] Crescent's Form 8-k for September 1965 omitted to state the true consideration for the purchase of the blueberry patch even though the form required "a brief

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[7] The regulations pursuant to the Securities Exchange Act define "parent" as anyone controlling a corporation "directly, or indirectly through one or more intermediaries." 17 C.F.R. § 240.12b-2(k) (1971).

description of the transaction or transactions resulting in the increase" of the amount of a registrant's securities. It will be recalled that this report referred to the issuance of 125,000 shares of Crescent treasury stock, but failed to mention the payment of $600,000 in cash and a $1.9 million promissory note —items the mention of which would seem to be a part of any description of the transaction, however, brief. The omission significantly furthered the concealment of the use of Crescent's money to buy its own stock.

The two substantive counts—Counts 26 and 27—on which Colasurdo alone was convicted likewise stand supported by the evidence. The Form 10-k and narrative statement filing for 1965 does disclose the total purchase price paid by Crescent for the plantation but omits to disclose Pakco's or Colasurdo's relationship to the seller. One purpose of a Form 10-k is, after all, to acquaint the SEC with "any material interest, direct or indirect" of any officer or director in a transaction to which the corporation is a party. The instructions so state. The Crescent accountants, after checking title to the blueberry plantation, wanted to include an explanatory footnote which would have disclosed the affiliation. They were dissuaded from doing so by a Colasurdo letter to them in March 1966, which stated that "no benefits inured to me from payment by Crescent Corporation to Makepeace . . .," and by a letter from Attorney Finkelstein to the effect that there was no affiliation between Pakco and Caletta. Appellant Colasurdo argues that there is a split of opinion among accountants as to whether generally accepted accounting principles require disclosure of transactions among affiliates. But the question is ultimately one of honesty and good faith.

United States v. *Simon*, 425 F.2d 796, 805-06 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). And while reliance upon accountants' advice might be "highly persuasive," although not conclusive, *United States* v. *Simon*, *supra* at 806, misleading accountants so as to cause them to omit material they would otherwise include is a strong indication of the falsity and misleading nature of the filing actually made. Since the conviction on this count was for making a materially "false or misleading" statement, rather than for violating a rule or regulation, although both are offenses under 15 U.S.C. § 78ff(a), Colasurdo is not entitled to rely on the "no knowledge" portion of the statute.[8] Even if he were, however, evidence shows that Colasurdo had a considerable working knowledge of SEC requirements, as indicated by his argument over the proposed footnote to Form 10-k.

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[8] Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10 000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section *for the violation of any rule or regulation* if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff(a) (emphasis supplied).

The appellants jointly or severally make certain other points which we will deal with briefly: (1) It was error to permit a Government witness, one Soupart, to testify about transactions with Whorl since he was unable in any way to identify Whorl from photographs or at the trial; (2) the Government's reference in argument to McLaney's use of certain notes in the SEC proceedings was improper; (3) the trial court failed to charge the jury on aiding and abetting; (4) it was error to fail to hold a hearing on whether the Government procured evidence on which the indictment was based in violation of appellants' attorney-client privilege; (5) the court erred in denying appellants an inspection of the grand jury attendance record; (6) scientific evidence to establish the backdating of documents was improperly admitted; and (7) Cipo was prejudiced by testimony before the SEC and at trial given after April 17, 1967, when he invoked the Fifth Amendment and refused to testify.

Soupart testified that one "Bud Whorl" came to his Nassau office in 1966 wanting to buy a corporation, that he took this individual to a lawyer's office where he paid $700 for Six M's Ltd., and that subsequently the individual outlined to Pindling in Soupart's presence a series of transactions involving Six M's, two American corporations, loans of millions of dollars, and the names "Delaware" and "New Jersey." Soupart could not identify Whorl in court, but this goes only to the weight of the testimony since the jury could find from other circumstances that it was in fact a representative of Colasurdo who purchased Six M's and who was acquainted with some of the scheme, and who was either Whorl himself or someone authorized by Colasurdo or Whorl to use Whorl's name.

Cf. Carbo v. *United States*, 314 F.2d 718, 743 (9th Cir. 1963), *cert. denied sub nom. Palermo* v. *United States*, 377 U.S. 953 (1964) (anonymous warning telephone call made at direction of one of conspirators in furtherance of the conspiracy).

Appellant McLaney had some notes with questions and answers on them which he used during the public SEC proceedings. At first he told the Hearing Examiner he had written them to himself and later he said the preparer was "a little attorney that works with me." The Government's closing argument that the jury could infer that the notes contained anticipated questions and answers and had been prepared for consistency's sake was, we hold, not improper as an argument of inference which might be drawn in view of all the evidence. *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States* v. *DeFillo*, 257 F.2d 835, 840 (2d Cir. 1958), *cert. denied*, 359 U.S. 915 (1959).

Colasurdo argues that he could only have been held on the substantive counts as an aider and abetter, under appropriate instructions by the court to the jury. *See United States* v. *Byrd*, 352 F.2d 570, 575-76 (2d Cir. 1965); *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962). A request for such an instruction was made by the Government and not the appellant, but was declined by the court, which accordingly informed counsel for appellant before the jury was charged.[9] Appellant at that time made no

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[9] The charge, more favorable to the appellant perhaps than an aiding and abetting charge, said:

> The government does not contend that each of the alleged false and misleading statements were actually made by Colasurdo and Whorl. Rather the government

objection to the omission of an aiding and abetting charge. There is no plain error under Fed. R. Crim. P. 52(b). Unlike *Byrd* and *Garguilo*, *supra*, the statute here itself used the words "causes to be made." 15 U.S.C. § 78ff(a). There was ample evidence that Colasurdo caused the false reports to be made; indeed, the Form 10-k was false because a footnote was omitted—a footnote which would have been inserted if Colasurdo had not misrepresented the facts to Crescent's accountants.

Appellants seek a dismissal of the indictment for failure of the trial court to hold a preliminary hearing on whether the grand jury had before it evidence obtained in violation of the attorney-client privilege. Attorneys who represented either Pakco, Crescent, or the individuals involved during the SEC proceedings were interviewed by the United States Attorney's office; and Jackson (attorney for Pakco), Kenney (attorney for Colasurdo, Whorl and others) and Balterman (attorney for Crescent) testified before the grand jury. In a hearing out of the presence of the jury at trial, the trial court sustained the claim of attorney-client privilege as to Attorney Jackson and Attorney Bondy (a Crescent lawyer). Colasurdo waived the attorney-client privilege as to Attorney Balterman on behalf of himself and Crescent in the SEC proceedings, but reasserted it at trial when evidence of cer-

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contends that in each case the false and misleading statements of material facts were either made or caused to be made by the defendants Lewis Colasurdo and Whorl.

It is sufficient if the government has proved to you beyond a reasonable doubt that the defendant you are considering either made the false and misleading statement or caused the false and misleading statement to be made in the required reports.

tain conversations dealing with corporation affiliations was sought to be adduced. Even if correct, appellants' assertions would not be grounds for dismissing the indictment. *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Lawn* v. *United States*, 355 U.S. 339, 348-50 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (indictment based on hearsay). Otherwise, before trial on the merits there would always be a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay. *See Lawn* v. *United States*, *supra* at 349.

Both Balterman and Kenney testified at trial, the former after an express and unconditional waiver of the privilege, and their grand jury testimony was furnished to the defense as Jencks Act material. Nevertheless, no instance in which either's grand jury testimony is said to have violated the attorney-client privilege is referred to by appellants; the only argument is that the SEC in pretrial interviews "may have impinged upon attorney-client relationships." Attorney Bondy, a Crescent attorney, was also interviewed by the United States Attorney's office but he did not testify before the grand jury and at trial the privilege was allowed as to his testimony. Attorney Jackson did not testify at trial. *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966), relied on by appellants, is not material to this case since there the attorney was sought to be examined after indictment of his client, and his investigation and preparation were the objects of the inquiry.

Appellants argue that they should have been permitted to inspect the grand jury attendance records to determine whether "12 or more jurors" under Fed. R. Crim. P. 6(f) were sufficiently in attendance when

evidence to support each of the "233 decisions," involving 11 defendants and 45 counts, was made by the grand jury. The rather ingenious suggestion by counsel that would require a preliminary trial to determine not just the sufficiency of the evidence on each count to sustain the individual count, but a determination of each juror's presence at the time when each item of evidence was introduced would bog down the courts in a morass, a veritable jungle of speculation and conjecture. *Cf. Costello* v. *United States*, 350 U.S. 359 (1956). It is enough to say, as Chief Judge Learned Hand said in *United States* v. *Thompson*, 144 F.2d 604, 607 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944):

> Since all the evidence adduced before a grand jury—certainly when the accused does not appear—is aimed at proving guilt, the absence of some jurors during some part of the hearing will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote.

Appellants additionally argue that evidence of the back-dating of Government Exhibit 504, McLaney's guaranty of Meyers' obligations to Pakco, to May 31, 1965, was improperly admitted.[10] This evidence was in the form of expert testimony by an IRS employee, Richard Brunelle, that the ink on the document was made by the Fisher Pen Company, and from a witness from Fisher that the particular ink was not marketed until two months after the date borne by the questioned document. Appellants argue forcefully that

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[10] All appellants rely on this point, but it is appellant McLaney who is most concerned with it.

the weight of the evidence is that the Government's ink expert was wrong, and that the present state of the art of ink analysis does not justify admission of this testimony. In support of this argument, appellants have pointed out that the Government's expert is the only one in the world who claims to be able to identify inks and that testimony by the very witness here involved was rejected recently in the Eastern District of Pennsylvania.[11] Here his testimony was adduced without objection. Nor can appellants claim surprise, since on November 18, 1970, they indicated that they might question the scientific basis for opinion testimony on ink identification, which appellants had known would be offered at least as early as October 28, 1970.[12] *See United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Appellants elected to battle it out with their own expert evidence to the contrary. Absent a timely objection to the competency of the Government's witness, the weight of the experts' testimony was for the jury. *United States* v. *Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), *United States* v. *Kelly*, 420 F.2d 26, 28 (2d Cir. 1969).

The last point raised, on appellant Cipo's behalf, is that he withdrew from the conspiracy on April 17,

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[11] *United States* v. *Bruno*, Cr. No. 70-12 (E.D.Pa., filed Sept. 24, 1971) (Brunelle's testimony held inadequate to sustain conspiracy count since many foreign inks were not included in his "ink library" and other variables were not taken into account).

[12] The Government had given appellants a copy of Brunelle's report on Exhibit 504, the McLaney guarantee, and other documents in April of 1970. Appellants did not know there would be back-dating testimony until November 6, 1970. Their requests for time extensions on November 6 and November 19 to prepare for Brunelle's testimony were granted.

1967, when he invoked his Fifth Amendment privilege and refused to testify before the SEC. Thus, the argument runs, any testimony before the SEC thereafter and at trial relating to any time after April 17, 1967, was erroneously admitted. Suffice it to say we agree with the trial court's conclusion that assertion of the privilege "is a neutral act from which no inferences can be drawn." It is not the "affirmative action" required by *Hyde* v. *United States*, 225 U.S. 347, 369 (1912); *see also United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965). While assertion of the privilege may not, of course, be considered to have furthered the concealment, it was not inconsistent with continuation of the concealment and certainly did not constitute withdrawal from the conspiracy. *United States* v. *Borelli*, *supra* at 389. No request to leave the issue of withdrawal to the jury was made; it is therefore unnecessary for us to consider the complexities of a charge which would refer to invoking the Fifth Amendment on the one hand and not be prejudicial to the defendant on the other. *Cf. Bruton* v. *United States*, 391 U.S. 123, 135 (1968).

Judgment affirmed.

LUMBARD, Circuit Judge (concurring)

I concur in all of Judge Oakes' excellent opinion. As to the trial judge's striking out paragraphs 6 and 7 of Count I, I think more needs to be said. I can see no good reason for the trial judge striking out, over the government's objection, these portions of the

indictment that alleged that Colasurdo had defrauded the stockholders and creditors of Pakco and Crescent through the use of the mails and wires.

The entire scheme was an attempt by Colasurdo to conceal from the stockholders and creditors the sham nature of the sales of the blueberry patch that allowed him, in effect to borrow from Crescent $2,000,000 for five years with which he purchased his controlling interest in Crescent. False reports to the SEC were only a portion of this scheme; for it to succeed, it was equally important that all information received by the stockholders and creditors be tailored so as to keep them ignorant of the real nature of Colasurdo's transactions. Obviously then, the allegations in the indictment that fraudulent material was transmitted to Pakco and Crescent stockholders and creditors over the wires and through the mails were quite properly included in the indictment and the government was entitled to prove these charges to the jury.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY
Chief Judge
HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEWIS L. COLASURDO, ET AL., DEFENDANTS

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

71-1373 thru 71-1376

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEWIS L. COLASURDO, ET AL., DEFENDANTS

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL, DEFENDANTS-APPELLANTS

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Henry J. Friendly
HENRY J. FRIENDLY
Chief Judge

J. EDWARD LUMBARD
U.S.C.J.

JAMES L. OAKES
U.S.C.J.

January 20, 1972

APPENDIX D

71-1373 thru 71-1376

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEWIS L. COLASURDO, ET AL., DEFENDANTS

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL, DEFENDANTS-APPELLANTS

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judge Hays took no part in the consideration of this case.

HENRY J. FRIENDLY
Chief Judge

January 20, 1972

APPENDIX E

[STATEMENT OF FACTS FROM LEWIS L. COLASURDO'S BRIEF IN THE COURT OF APPEALS]

Preliminary Statement and Statement of the Case

Defendant-appellant Lewis L. Colasurdo appeals from a judgment of conviction entered on February 10, 1971, by the United States District Court for the Southern District of New York (Bonsal, J.).

The judgment of the District Court (V. I-592a): *

a) Upon a jury's verdict, convicted defendant Colasurdo on Counts 1, 22, 23, 26 and 27 of the indictment;

b) Sentenced him as follows:

Count 1 Two years in prison and $10,000 fine.

Count 22 Imposition of sentence suspended and $10,000 fine.

Count 23 Imposition of sentence suspended and $10,000 fine.

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* References are to pages in the Appendix. The Appendix consists of fourteen volumes. Volume I contains the pertinent pretrial and post-trial proceedings (reference to pages in this volume are preceded by "V. I—"). Volumes II-XI contain the transcript of the trial (references to pages in these volumes are preceded by "T"). Volumes XII-XIV contain the pertinent exhibits. References to the exhibits are cited as follows: "GX" refers to government's exhibits; "DLC" refers to defendant Colasurdo's exhibits; "DM" refers to defendant McLaney's exhibits; "DAC" refers to defendant Cipo's exhibits; "DW" refers to defendant Whorl's exhibits; and "Ct. X" refers to the Court's exhibits).

Count 26 One year in prison (concurrent with Count 1) and $10,000 fine.

Count 27 Imposition of sentence suspended and $10,000 fine.

The Defendants and the Indictment

The indictment in this case, returned by the grand jury on July 1, 1969, was a complex forty-nine page document containing forty-five counts against eleven defendants. Count 1 charged all defendants with having engaged in a conspiracy with multiple but related objectives.

The grand jury charged that it was part of the conspiracy that defendants and their alleged co-conspirators:

> "unlawfully, willfully and knowingly would devise a scheme and artifice to defraud the stockholders and creditors of Pakco Companies, Inc. and Crescent Corporation and the creditors from whom the defendants and their co-conspirators borrowed in connection with the acquisition of Crescent Corporation stock . . ." (¶ 6).

Subsequent parts of Count 1 and the government's bill of particulars amplified this charge to make it clear that the fraud on the shareholders and creditors consisted of the following:

a) Defendants Lewis L. Colasurdo and Alexander N. Bronsen "would and did acquire control of Crescent Corporation . . . by purchasing, through companies wholly owned by them and created for the purpose, a controlling share of the common stock of Crescent" (¶ 11b), and

"Assets of Pakco and Crescent would be and were directly and indirectly used to finance said acquisition . . ." (¶ 11c).

b) The fact that assets of Pakco and Crescent were being used "for the personal gain" of Colasurdo and Bronsen was concealed from shareholders and creditors.

Having charged a conspiracy to defraud, the grand jury also charged that it was part of the conspiracy:

(1) To conceal the use of these assets by failing to disclose such use in reports filed with the SEC, and

(2) To conceal these facts by testifying falsely, suborning others to testify falsely and by threatening witnesses to prevent disclosure of these facts.

Thus, from the face of Count 1, it is apparent that the grand jury's charge consisted of two closely related parts:

(1) the conspiracy to defraud shareholders and creditors, and

(2) subsequent efforts to conceal the commission of the fraud from the SEC.

This was not, as we shall show, the charge submitted to the trial jury by Judge Bonsal.

The named defendants were: Lewis L. Colasurdo, president and a director of Pakco, and later of Crescent; Michael J. McLaney, the principal of Caletta Blueberry Company, Inc. (named as a co-conspirator); John W. Becher, an officer of a Pakco subsidiary; Alexander N. Bronsen, vice-president and a director of Pakco, and later of Crescent; Anthony Cipo, an employee of a Pakco subsidiary, and later, the principal of Makepeace, Inc. (named as a co-conspira-

tor); Anthony Colasurdo, brother of Lewis and a director of Pakco; Israel Finkelstein and Richard G. Taylor, attorneys; Frederick J. Wagner, a Pakco employee, and Everett A. Whorl, controller of Pakco, and later, treasurer of Crescent.

All of the defendants were named in the conspiracy count. All of the defendants except Taylor and Torres were named in substantive mail fraud (Counts 2-19) and wire fraud (Counts 20 and 21) counts. Defendants Colasurdo and Whorl were named in six counts alleging false filings with the SEC (Counts 22, 23, 25 through 28) and defendants Cipo and Finkelstein were named in two of these counts (Counts 26 and 27). Defendants Colasurdo and Whorl were named in one count charging a failure to file a report with the SEC. (Count 24). Defendant Colasurdo was also charged with five counts of perjury (Counts 34-39), four counts alleging false statements to the SEC (Counts 40-43) and one count of obstruction (Count 45). Whorl was also charged with four counts of perjury (Counts 29-32), one count charging a false statement to the SEC (Count 33) and one count of obstruction (Count 44).

Defendant Finkelstein died prior to trial, and neither Bronsen nor Torres was present at the commencement of the trial. A joint trial of the remaining eight defendants on Counts 1 through 19 and 22 through 28 lasted three months. After the Government rested, the Court granted a judgment of acquittal of defendant Taylor, denied similar motions by the other defendants, and, prior to submission of the case to the jury, took the following action with respect to the counts on trial:

Count	Action by the Court
1	Amended
2-19	"Severed" over defendants' objection
22	"Amended"*
23	"Amended"*
24	Dismissed
25	"Amended"*
26	"Amended" (Dismissed as to Cipo)*
27	"Amended" (Dismissed as to Cipo)*
28	Dismissed

The jury returned a verdict of acquittal on Count 1 as to defendants Becher, Anthony Colasurdo and Wagner, and guilty as to the remaining defendants; in addition, the jury returned a verdict of guilty as to defendant Lewis L. Colasurdo on Counts 22, 23, 26 and 27, acquittal on Count 25, and guilty as to defendant Whorl on Counts 22 and 23, and acquittal as to Counts 25, 26 and 27.

Pre-Trial Proceedings

Although there were numerous pre-trial motions, all of which were denied without argument (except for the discovery motions and those related to the wire fraud counts), it is necessary at this juncture only to refer to the fact that, on its own motion, the Court severed Counts 29 through 45, the perjury, obstruction and false statements counts and on the de-

* These counts were not amended in precisely the same manner as Count 1, although the effect is the same. Each of these substantive filing counts charged that a Crescent filing was deficient in failing to disclose that a particular transaction was part of a "plan." The Court held that the SEC rules required no such statement and, in effect, withdrew that part of those counts from the jury (by directing the prosecutor not to argue it to the jury) (T. 6820-21; 7038).

fendants' motions dismissed Counts 20 and 21 the wire fraud counts (V. I-83a-84a; 90a-91a).

The Trial

The trial of the indictment commenced on September 16, 1970 before Judge Bonsal and a jury. At the conclusion of the government's case, and at the conclusion of the entire case, the Court denied all defense motions for judgments of acquittal except as to defendant Taylor. However, at the conclusion of the government's case, upon consideration of the defendants' motion to dismiss Count 1, the Court ordered that the indictment be amended to remove the charge of conspiring to defraud shareholders and creditors.

The Court directed the government to prepare an amended indictment omitting therefrom those portions which had been deleted by the Court. A copy of the indictment was not submitted to the jury.

The case was submitted to the jury on the afternoon of December 10, 1970. The jury was dismissed on the afternoon of Friday, December 11, 1970 with the consent of the defendants after having returned a verdict of guilty as to defendants Colasurdo and Whorl on Count 22. The jury returned on Monday, December 14, completed its deliberations and rendered its verdict that afternoon.

Statement of Facts

Introduction

In 1964-65, Pakco Companies, Inc., a public company, controlled by appellant Colasurdo, negotiated for the purchase of two unrelated blocks of Crescent Corporation, a company listed on the New York Stock Exchange. When it became apparent that Pakco was

not financially able to make the acquisition, Colasurdo and defendant Alexander N. Bronsen each formed a corporation, ALCA Industries, Inc., owned by Colasurdo, and BLCB, Inc., owned by Bronsen, and those corporations purchased the blocks of stock in June, 1965.*

Pakco later acquired those blocks of Crescent stock from or through ALCA and BLCB, below the original cost to ALCA and BLCB. Pakco was then able, within less than one year, to sell these blocks of Crescent stock, together with another smaller block it acquired, for more than $11 million cash, resulting in a profit to Pakco of more than $1.5 million.

The government did not contend that the Crescent stock purchases were illegal or improper. It did, however, claim that assets of Pakco were used to finance the stock purchases, a contention which was, essentially, not in dispute. As the indictment was returned, it charged that by using the assets of the corporation, the defendants defrauded the shareholders. However, by dismissing the "fraud" charge at the close of the government's case, the court removed the question of fraud or illegality in the use of those assets.

In order to prove the fraud charges—which were later dismissed—the government introduced evidence relating to a series of transactions involving Pakco's blueberry plantation located in southern New Jersey. On May 19, 1965, Pakco's Executive Committee and Board approved the sale of the plantation to Charles

* Although Pakco was unable to provide the $8.4 million necessary to purchase these blocks of Crescent stock, or even the $3.1 million down payment, it did assist by lending a small portion of this—$318,200—to the two officers who were purchasing the stock.

Meyers, a nominee of defendant Michael McLaney, and title was taken by Caletta Blueberry, Inc., a company owned by McLaney. In the ensuing months, the plantation was sold to Makepeace, Inc., a company owned by defendant Anthony Cipo, and then to Crescent Corporation, which paid $4 million, $2.5 million of which was paid in cash, and the balance by 125,000 shares of Crescent stock. At the time of the sale, an independent appraiser valued the property in excess of $4 million. As more fully appears below, the Caletta notes given to Pakco were fully paid by April, 1967, and Pakco realized a net gain of approximately $3.2 million on the sale of the blueberry plantation.

As noted above, the case submitted to the trial jury —a conspiracy to defraud the SEC—bore little relationship to the case which came out of the grand jury and which went to trial—a case of defrauding the shareholders followed by concealment of the fraud from the SEC. We direct ourselves below to this problem, and to the government's failure to prove the essential element of the case that went to jury—agreement among those claimed to be conspirators. Before reviewing the transactions which were the subject of evidence, one observation will assist in providing a framework for the case.

The government introduced approximately one thousand pages of testimony given by the defendants before the SEC. From this testimony it asked the jury to infer a conspiracy, a flaw with which we deal below. A defect of equal magnitude: by casting the case in this way, the government was not required to specify the respects in which the testimony it alleged as false was false, and it escaped the salutary effect of the two-witness rule, thereby enabling it to prosecute a perjury case on uncorroborated testimony.

If this had been a perjury case, the government's conduct would have been decisive—the case against Colasurdo could not have been submitted to the jury on the basis of "an oath against an oath." But because the charge against defendant Colasurdo was conspiracy to commit a series of offenses, including perjury, the absence of corroboration did not flaw the government's case and did not even prevent the government from asking the jury to conclude that Colasurdo's SEC testimony, was in fact, perjurious. And—the coup de grace—the government asked for a verdict on a charge of conspiracy without having to prove the essential element: agreement. No greater tribute has ever been paid to Justice Jackson's observation that "a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion).

a. Pakco Companies, Inc.

Pakco, a diversified over-the-counter company engaged in agriculture, plastics, electronics and finance, was founded in 1960 by Colasurdo and his two brothers (GX 195; GX 243). In December, 1961, the company made a public offering of its stock, and the company had been publicly held since (GX 243). Colasurdo was, and still is today, the largest shareholder of the company owning approximately 22% of the outstanding stock (GX 529; T. 1784-85). His two brothers, Anthony (who was a defendant) and Gerard (who was not), owned then and now an additional 20% of the stock, of which 16% was at one time the subject of a voting trust, over which Colasurdo was the voting trustee (GX 529; T. 1784-85). In addition, Colasurdo was president of Pakco from its or-

ganization until as of June 10, 1965, when he resigned to accept a similar position with Crescent (GX 243; GX 536; GX 537L). Bronsen and Whorl resigned at the same time as vice president and comptroller, respectively, of Pakco (GX 537I; GX 537K). Pakco's board of directors was composed of individuals of independent mind—all of whom voted for the transactions which were the subject of testimony, and all of whom believed then and at the time of the trial that the transactions were in the best interests of Pakco and its public shareholders (T. 1673-74; 1785-86; 1810; 1822-23; 3214-15; 3397-99; 3427-30).

Today, Pakco is still a publicly held company, Colasurdo is still its largest shareholder and the company is vital, growing and profitable (V. I 670a-671a).

b. Crescent Corporation

Crescent was a publicly held company engaged in a multiplicity of business (DLC "J"). Its stock was listed for trading on the New York Stock Exchange.

Colasurdo was president of Crescent from June 29, 1965 until 1968, when Crescent was merged into National Industries, a company listed on the New York Stock Exchange (GX 536) (V. I 670a).

c. The Acquisition of Crescent Stock by ALCA and BLCB

1. The Floersheimer Block

Sometime during the summer of 1964, Stephen Floersheimer, the managing partner of Sutro Bros., a member firm of the New York Stock Exchange, was in search of a buyer for a substantial block of Crescent which he represented (T. 72-73). He sought a

buyer because Crescent was not doing well under its then present management (T. 234-35).

Floersheimer met Colasurdo, who told him that he intended to expand Pakco and that an arrangement with Crescent might be feasible (T. 75). The negotiations which ensued between Pakco and the Floersheimer group consumed many months; Floersheimer inspected Pakco facilities at several locations, and the discussions were aimed at either a sale of the Floersheimer block to Pakco or a merger of Pakco and Crescent (T. 134-35; 139-40; 142-44). However, as a result of his analysis of Pakco's financial condition, Floersheimer concluded that a sale of his stock to Pakco or a merger between Pakco and Crescent would not be feasible, a judgment which was shared by Mr. Evans—Pakco's chairman—who testified for the government (T. 200-01; 1661; 1825).

It was determined, therefore, that ALCA Industries, Inc., a corporation solely owned by Colasurdo and formed for that purpose, would acquire the Floersheimer block (T. 2022).

The transaction closed on June 18, 1965 with the acquisition by ALCA of 436,000 shares of Crescent from the Floersheimer group at a price of $15 per share, or a total purchase price of $6,546,000 (T. 2039-40). Of this amount, $2,182,000 was paid at the closing, and the balance was required to be paid in equal annual installments of $2,182,000 in June, 1966 and June, 1967 (GX 8).*

* The consideration paid by ALCA for each of the acquired Crescent shares was $5 in cash plus one share of non-voting $5 par value convertible preferred stock, Series A, of ALCA and one share of non-voting $5 par value convertible preferred stock, Series B, of ALCA. Each series of preferred

The initial cash payment made by ALCA on June 18, 1965, aggregated $2,182,000. These funds were obtained (a) by borrowing $218,000 at 4% interest from Pakco, and (b) by borrowing $1,963,800 from First Pennsylvania (GX 194; GX 320). The bank loan was by its terms due and payable on October 18, 1965, and was secured by a pledge of the 436,000 shares of Crescent stock as collateral (GX 33; GX 34).

The government's evidence showed that Pakco loaned $318,200 to Dr. Bronsen in connection with the Crescent stock purchase (GX 27; GX 30A). This was done pursuant to a resolution adopted June 14, 1965, by the Executive Committee of Pakco, authorizing a loan of not more than $325,000 to be made to Bronsen if required in order to permit him to purchase stock of Crescent (GX 194). Mr. Evans explained why Pakco loaned this money to Bronsen:

> "As we discussed it, we had been negotiating to buy stock in [Crescent] and we wanted to con-

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stock was redeemable, at the option of ALCA, at a cash redemption price per share equal to its par value, plus unpaid dividends, if any, of 5% of par value per year. The holders of the preferred stock were given conversion rights in the event of specified defaults. Pursuant to the terms of the acquisition, all of the acquired Crescent shares were to be held in escrow by First Pennsylvania Bank and Trust Company ("First Pennsylvania") commencing October 18, 1965 in order to preserve the conversion rights of the preferred stock of ALCA. Upon redemption of all of the Series A preferred stock, 40% of the acquired Crescent shares were required to be released from such escrow, and upon redemption of all of the Series B stock, the balance of the shares was required to be so released. Under the escrow agreement, ALCA was to have sole, full and unrestricted beneficial ownership of the required Crescent shares (GX 8; GX 38).

tinue that, but we couldn't as a company, and we still wanted to continue it as a board. And so we decided to loan money in order to see if we could get an interest in Crescent Corporation" (T. 1664). (See also, GX 194).

As it developed, Bronsen needed only $100,000 of the amount loaned, and the balance of $218,200 was utilized in connection with the Floersheimer block (GX 27).

2. The Mencher Block

Another substantial block of Crescent was owned by an investor named Dr. William Mencher (T. 343). Mencher was disenchanted with the progress being made by Crescent and he negotiated for the sale of 125,000 Crescent shares to Pakco (T. 370-71). Because of Pakco's financial difficulties, at the very last moment—on the morning of the closing—the purchase contracts were amended to delete Pakco as the purchaser and to substitute BLCB Industries, Inc., a corporation owned by Dr. Bronsen, and formed for that purpose (T. 2054-57; GX 46; GX 48; GX 49; GX 50).

This transaction, too, closed on June 18, 1965 (T. 2058). On that date, BLCB acquired 125,000 shares of Crescent from Dr. Mencher at a price of $15 per share, or a total purchase price of $1,875,000 (T. 2061).

Of the $1,875,000 purchase price, the sum of $1,005,000 was paid in cash on June 18, 1965, and $870,000 was in the form of three installment promissory notes of $290,000 each, bearing interest at 5.5% per annum, payable on January 18 and June 18, 1966, and January 18, 1967, respectively (GX 47A; GX

48; GX 49; GX 50). These notes were guaranteed by Colasurdo and his wife (GX 48; GX 49; GX 50).*

When BLCB acquired 125,000 shares of Crescent Common Stock on June 18, 1965, the necessary funds were supplied by Bronsen. $100,000 of the cash payment was borrowed by Bronsen from Pakco and $900,000 was borrowed by Bronsen from Franklin National Bank (GX 30A; GX 57). The $900,000 was paid by a $1,000,000 check issued on June 18, 1965, with the surplus of $100,000 being returned to the bank on June 19, 1965 (GX 30A; GX 57). The bank loan was guaranteed by Colasurdo (T. 460; GX 71). The 125,000 shares were deposited with the bank as collateral (DLC "F").*

* * * *

The government contended that these two blocks of stock were acquired for the personal benefit of Cola-

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* On January 18, 1966, the first installment promissory note was paid (GX 52). Thereafter, and in February, 1966, 30,000 of these 125,000 shares of Crescent Common Stock were returned to the seller and the two outstanding promissory notes were cancelled (GX 53). Dr. Mencher testified that he had requested the return of these shares because he was impressed with Crescent's progress under Colasurdo's management (T. 385-87).

The return of these 30,000 shares required their withdrawal from the Franklin National Bank which was holding them as collateral on a loan to Bronsen (DLC "F"). At that time, BLCB borrowed 30,000 shares of Crescent stock from Makepeace, Inc., and deposited such shares with the bank as substituted collateral (DLC "F").

* In January, 1966, Bronsen borrowed an additional $299,351.51 from Franklin National Bank and made payment of BLCB's first promissory note of $290,000 (GX 52; GX 89).

surdo and Bronsen and that Colasurdo and Bronsen utilized assets of Pakco and Crescent to finance the acquisition of these shares for their own personal benefit. The defendants did not dispute the use of certain assets of Pakco and Crescent in connection with the financing of these acquisition, but did contend at trial that in making these stock purchases, it was understood that the Crescent stock would be made available to Pakco at cost if and when Pakco was able to make the acquisitions.** As appears below, Pakco did acquire these blocks of Crescent stock below the cost to ALCA and BLCB.

d. Changes in Crescent Management

At a meeting of the Crescent Board of Directors on June 29, 1965, four of the seven directors resigned and were replaced by Colasurdo, Bronsen, Harry Balterman and James Buchanan (GX 536). The re-

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** On at least one prior occasion, Pakco was faced with a similar problem: an opportunity to make an acquisition combined with a financial inability to do so. Thus, according to the testimony of Lewis M. Evans, Pakco's chairman, Pakco had an opportunity in 1961-62 to acquire two insurance companies. Because Pakco was financially unable at the time to make the purchase, but wanted to retain the opportunity for itself, Colasurdo and his wife personally borrowed money from a bank and bought the two insurance companies. Later, when Pakco was financially able to make the acquisitions, Colasurdo turned the insurance companies over to Pakco at his cost (T. 1778-80). In addition, from time to time, Colasurdo has assisted Pakco in order to further its objectives. Thus, for example, he deferred the receipt of dividends on his stock, although the other shareholders were paid, obtained personal loans for the benefit of Pakco, and personally guaranteed loans made to Pakco (T. 1557-58; 1873-74; 1895-96; DLC "BN-2"; DLC "BN-11").

maining directors were persons who had previously served as directors and were not nominated by Colasurdo (T. 2483-84). At the same meeting, Colasurdo was elected president of Crescent; Bronsen, executive vice-president; Whorl, treasurer; Balterman, secretary; and Buchanan, chairman of the Board of Directors (GX 536).

e. The Plantation Transactions

In 1960, Pakco acquired from members of the Colasurdo family a plantation, including land, building and improvements located near Mays Landing, Hamilton Township, Atlantic County, New Jersey (T. 1796; GX 243). The land (approximately 2,000 acres) had been acquired over a period of 35 years by the Colasurdo family, and was located approximately 14 miles from Atlantic City (T. 1796-97; GX 243). An appraisal by Helmsley-Spear, Inc. in 1961 valued the land at approximately $2.5 million (T. 3428). However, on the advice of Price Waterhouse & Co., the Company's auditors, the plantation was carried on Pakco's books at a nominal value of $1.00 because of the absence of an historical cost figure (T. 3947-48; GX 195). Pakco undertook to develop the blueberry plantation as a model agricultural project with the cooperation of governmental and educational organizations (T. 1796; GX 243). By 1964, however, the project had become a cash drain on Pakco, which had invested approximately $640,000 in it, and it was determined to dispose of the property (T. 1519; 1682; 1797; 1804-06; 3643-45; GX 139D-1).

1. Caletta Blueberry Co., Inc.

On May 19, 1965, Pakco's Executive Committee and Board of Directors approved a sale of the plantation

to Charles E. Meyers, or his nominee (GX 537G; GX 537H).* This authorization led to two agreements dated May 31, 1965 between Pakco and Meyers: one covering a sale of the plantation, and the other, a sale of the 1965 crops (GX 501; GX 502). For the plantation, Pakco received an installment promissory note in the amount of $3,350,000, payable in five annual installments of $670,000, the first annual installment payable July 1, 1970, bearing interest at 5.5% (GX 501; GX 505). Pakco was fully paid by early 1967 (T. 1821). For the crops, Pakco was to receive $500,000 by December 1, 1965 (GX 502). Pakco did, in fact, receive the $500,000 by December 1, 1965 (T. 1580-81; DLC "L").* Pakco realized a net gain of approximately $3.2 million from these transactions (T. 1582; GX 139D-1).

Meyers was the nominee of McLaney, who took title in the name of Caletta Blueberry Co., Inc. ("Caletta"), which, as with many real estate transactions, was a corporation formed for that sole purpose (T. 1811; 2625; GX 506).**

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* According to Colasurdo's SEC testimony, unsuccessful efforts to finance or dispose of the property were made during the six months preceding May, 1965 (T. 4453-64).

* There was evidence that the structure of the arrangement—differentiating between land and crops—was based on tax considerations, that the installment nature of the pay-out was based on tax considerations, and that Pakco had had a number of prior transactions involving long-term pay-outs (T. 1555; 1588-89; 1812-14; 3614-44).

** The testimony of defendants McLaney, Colasurdo and Whorl, given before the SEC concerning the negotiations and sale of the plantation to Caletta Blueberry, Inc., was read to the jury. In substance, McLaney testified that in mid-May, 1965, he was contacted by Charles E. Meyers and John Caletta,

Pakco did not obtain any lien or mortgage on the plantation, but the installment promissory note was guaranteed by McLaney,* a wealthy investor known for many years by Lewis M. Evans, Chairman of Pakco's Board (T. 1818; GX 504; See T. 1676-77). McLaney had engaged in a real estate transaction with Pan American World Airways, and had been a substantial shareholder of General Development Corporation, the largest real estate development company in the United States (T. 1818-19; 3179; 6525-26). Evans testified that financial reports on McLaney at the time indicated that McLaney was very substantial, that he found McLaney's note satisfactory, that he told the Board he was happy that McLaney was the principal, and that the Board was satisfied that McLaney was a man of substance (T. 1817-20).

Caletta, a New Jersey corporation was incorporated on August 6, 1965 by Israel Finkelstein, an attorney who had performed services for a Pakco subsidiary

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who told him that they had had some discussions with Colasurdo concerning the sale of the plantation. Meyers told McLaney that the price for the land was $3,350,000 and the price for the blueberry crop was $500,000. McLaney then contacted Colasurdo directly (T. 3177-79; 3203-04; 3183-84; 3303-04; 3311-16; 3324-28).

Colasurdo testified that after a conversation with Meyers concerning the sale of the plantation. McLaney called him and told him he was interested in purchasing it. Thereafter Colasurdo and McLaney agreed to the sale (T. 4441-51).

* The government contended that the sale to Meyers did not take place on May 31, but rather on July 1, 1965. In addition, the government sought to show that the McLaney guarantee which is dated May 31, 1965, could not have been signed earlier than two months later. As appears in Point II of the McLaney-Cipo-Whorl Joint Brief, the government's evidence on this latter point was improperly admitted.

(T. 645; 648; 1507). All stock of Caletta was held directly or for the benefit of McLaney (T. 3151-52; 3713).

Pakco conveyed the plantation to Caletta by a deed dated August 9, 1965 and recorded on September 23, 1965 (GX 506).

Whorl was elected secretary-treasurer of Caletta on August 9, 1965 (T. 3143; 3146). According to his SEC testimony he was placed in this position to protect the interests of Pakco, which was a substantial creditor of Caletta * and he had assumed similar positions in other companies which were indebted to Pakco (T. 6172-73).

2. Makepeace, Inc.

Pursuant to an agreement dated August 31, 1965, Caletta agreed to sell the plantation to Makepeace, Inc., a company wholly owned by Anthony Cipo, a former employee of a Pakco subsidiary (T. 4089; GX 510). The purchase price was $3,900,000, $500,000 payable by November 30, 1965, and the balance payable in five annual installments of $680,000 each, with interest at 5.5%, the first installment payable on March 31, 1970 (GX 510).

Finkelstein reserved the corporate name for Makepeace on June 8, 1965, and incorporated the company on July 21, 1965 (T. 669; GX 104). By deed dated August 31, 1965, and recorded on September 23, 1965, Caletta conveyed the plantation to Makepeace (GX 512).

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* Woodcock, Moyer, Fricke & French, Inc., Pakco's investment bankers, placed one of its partners, Gordon Pfau, on Pakco's Board (T. 3382).

3. Crescent Properties, Inc.

In September, 1965, Makepeace sold the plantation to Crescent.**

On July 27, 1965, the Board of Directors of Crescent preliminarily approved the acquisition of the plantation from Makepeace and, on August 17, 1965, the Board gave final approval to the acquisition (GX 536A; GX 536B).*

** McLaney testified that in mid-August, 1965, he met Cipo at a Miami country club, at which time he gave Cipo a 30-day verbal option to purchase the plantation. Cipo told McLaney that he knew of a prospective purchaser, but did not at that time indicate who it was. At a later time, Cipo told McLaney that Colasurdo was interested in purchasing the plantation. McLaney agreed to sell the plantation to Makepeace in exchange for a note from it in the amount of $3.4 million collateralized by 125,000 shares of Crescent stock, to be held by Caletta, and $500,000 in cash (T. 3721-27; 3734-39).

Cipo testified that after he received the option from McLaney, he negotiated with Colasurdo, who was acting on behalf of Crescent Corp. They agreed that Crescent would buy the plantation from Makepeace for $4 million, $600,000 in cash, 125,000 shares of Crescent and the balance in notes (T. 4078-88; 4093-94; 4099-4103).

Colasurdo testified that Cipo told him of McLaney's unhappiness with the purchase of the plantation and also told him that McLaney had given him a 30-day option to locate a purchaser for the property (T. 4505-12).

* Balterman testified that it was not disclosed to the Board that the property under consideration had been owned by Pakco. However, he also said that he left the Board meeting to get a copy of Pakco's annual report which the Board then discussed. He could not say that the disclosure had not been made while he was out of the room. James Shiels, another director, said he did not remember if the Board had been told, and Buchanan, the only other Crescent director who testified,

By agreement dated September 15, 1965, Makepeace agreed to sell the plantation for $4 million to a wholly-owned subsidiary of Crescent, a corporation formed for that purpose. The purchase price consisted of $600,000 in cash, 125,000 shares of Crescent common stock valued at $1,500,000,** and an installment promissory note in the amount of $1,900,000, payable in four successive annual installments of $475,000, the first installment payable on September 15, 1969, with interest at 5.5% per annum on the unpaid balance, to be paid simultaneously with principal installment payments. The note could be prepaid at any time without penalty (T. 2624-25; GX 516). A contemporaneous independent appraisal valued the property at more than $4 million (T. 2987-88).

Finkelstein represented Makepeace in connection with its transfer of the plantation to Crescent (T. 2093). The closing of the agreement between Crescent and Makepeace took place on September 25, 1965, but the documents were held in escrow for a number of days until Balterman received a title report (T. 2105-06; 2139; 2144-45).

In the course of their consideration of the acquisition, Crescent's Board discussed the proposed terms of purchase, and several of the directors urged that, to the extent possible, Crescent use more cash and

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said that he knew the property had been owned by Pakco (T. 1187; 2077-79; 2087; 2545; 6538; 6541-42).

** Subsequently, Caletta received the 125,000 shares of common stock from Makepeace as security for the note owed by Makepeace to Caletta (T. 3738; GX 511A). In October, 1966, Pakco received these shares as security on Caletta's note (T. 3752; GX 523A).

less of its stock in the purchase (T. 1197-98).* Crescent had, at that time, substantial amounts of idle cash, a portion of which it invested in municipal bonds in order to make the cash productive (T. 1201; 2632; DLC "V"). Thus, although the total purchase price remained the same, the terms originally proposed were changed to decrease the amount of stock by $500,000 and to increase the amount of notes and cash by an equivalent amount (GX 536A; GX 536B).

4. Prepayment of Crescent's Note

Shortly after the Crescent-Makepeace closing, Crescent prepaid the $1.9 million note (GX 99; GX 131B; GX 134C). Of the $2.5 million cash which Makepeace received from Crescent, it paid $500,000 to Caletta which in turn paid $500,000 to Pakco (GX 130C; GX 130D; GX 130E; GX 132F; GX 132J; GX 132K). Exhibits introduced by the government showed that the balance of $2,000,000 was transferred from Makepeace's account to an account of Delaware & New Jersey Properties, Inc., a company formed by Bronsen, which then transferred the funds to ALCA, which repaid its indebtedness, plus interest, to First Pennsylvania (T. 2146-47; GX 40; GX 132G; GX 132H; GX 132I; GX 133G).

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* Several of Crescent's directors had personal knowledge of the locality and were openly enthusiastic about the acquisition. One of the directors, Mr. Weininger, was quoted as saying that the property was located in what he felt was the best locale for future industrial development on the entire East Coast (GX 536A). Mr. Buchanan, who had substantial experience in real estate, testified that while the property was being purchased at $1,600 an acre, he told the Board the property could be worth $22,000 an acre for industrial purposes (T. 6526; 6634). Crescent purchased the property for future appreciation, and not for income (T. 2523).

Colasurdo explained that the monies transferred represented the proceeds of a loan to him from Six M's Ltd., a Bahamian corporation headed by Lyndon O. Pindling, the Premier of the Bahamas (T. 5114-16; 5123).

Colasurdo testified that at the end of September, Cipo was at Crescent's offices in connection with the sale of the plantation, and he inquired what Cipo was doing with the proceeds of the transaction. Cipo said that he had agreed to purchase a $2 million debenture from Six M's (T. 5098-5106; DAC "E-1"). Colasurdo said that at his request Cipo introduced him to Pindling in October, 1965, at which time Colasurdo arranged to borrow $2 million from Six M's (T. 5108-16; GX 346A).* Colasurdo told Pindling that he was

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* The government sought to counter this testimony by calling Paul Soupart, who testified that a man named Whorl—whom he misidentified in court—went to him in 1966 to buy a shell corporation named Six M's, and that he then introduced Whorl to Pindling who became the new attorney for the company (T. 5391-92; 5405-06). In two previous SEC interviews, Soupart had stated that the events had occurred in 1965, that he could not remember the name of the man who came to him, and that he did not even know the name Whorl (DLC "BG" and "BK"). At Point III of the McLaney-Cipo-Whorl Joint Brief, we show that Soupart's testimony was inadmissible. Certified exhibits introduced by the government showed that Six M's did not file with the Bahamian Registrar General a "notice of the situation of the registered office", a list of officers and directors, or an annual return, and that the Registrar General struck the company on April 3, 1967 (GX 332). Under Bahamian law, liability of the directors, managing officer and members of the company continue (GX 334). In addition, Bahamian law provides for restoring of companies which have been struck (GX 334), but the government offered no evidence as to what, if anything, occurred after the company was struck.

going to use the money to repay a loan used to purchase Crescent stock (T. 5116). A few days later, Colasurdo, Pindling, Whorl and Bronsen met in New York, at which time Pindling said he preferred not to take $2 million out of the United States and bring it back again (T. 5173-74; 5178). Bronsen offered to assign his interest in Delaware & New Jersey Properties, Inc. to Six M's so that the fund would not have to leave the United States, and, following the assignment to Six M's, the bank account of Delaware & New Jersey Properties, Inc. was used to transfer the funds (T. 5173-86).*

* * * *

It was the government's position that the successive transfers of the plantation from Pakco to Caletta to Makepeace to Crescent were sham transactions, that Caletta and Makepeace were merely conduits, and that the specific purpose of these various transactions was to make Crescent's funds available to Colasurdo to enable him to repay ALCA's obligation

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* According to Balterman's testimony, he formed Delaware & N. J. Properties, Inc. at Bronsen's request in late September, 1965 (T. 2146-47). Bronsen told Balterman he did not want anyone at Crescent to know about this, and specifically told Balterman he did not want Colasurdo to know about it (T. 2584). The evidence showed that Bronsen and Whorl were listed as officers, but it was Whorl's testimony that he was so listed purely as an accommodation to Bronsen (T. 5024; GX 133B; see also T. 737-38). On October 4, 1965, all rights in Delaware & N. J. were assigned to Six M's (T. 5021-23; 5031-34; GX 347). There was evidence that, thereafter, Bronsen wrote several checks on the Delaware & N. J. bank account covering the costs of forming the corporation, and removing funds that had been deposited prior to the assignment to Six M's, and that the bank continued to send statements to Bronsen (GX 133).

to First Pennsylvania.* The defendants, on the other hand, on trial, and in their testimony before the SEC, took the position that the transactions were bona fide transactions. Balterman testified that Whorl had told him at the time that the prepayment of the note was motivated by sound business reasons—a desire to effect a savings for Crescent of interest expense (T. 2632). According to Colasurdo's SEC testimony, the savings amounted to $200,000 (T. 4535-38). As one of the directors, James Sheils, testified, the Board specifically authorized a prepayment clause because prepayment might be the desirable thing to do (T. 1194).

f. Agreement and Termination of Agreement for Sale of HIMCO and Elliott and Evans, Inc.

On December 21, 1965, pursuant to an agreement of that date between Crescent and Pakco, Crescent acquired all of the outstanding capital stock of two Pakco subsidiaries—Hammonton Investment and Mortgage Co. (HIMCO) and Elliott and Evans, Inc. ("Elliott")—from Pakco in exchange for 600,000 treasury shares of Crescent common stock (GX 185).*

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* In support of its theory, the government introduced the testimony of Ronald Baldwin, a tax manager employed by Price Waterhouse, as to a conversation he had with Whorl on May 25 or 26, 1965. Baldwin testified that, during the course of this meeting, Whorl discussed a series of transactions involving, among other things, the acquisition of stock of Crescent by ALCA, the purchase by ALCA of Pakco's farming operations, the merger of Pakco and Crescent, and the purchase by Crescent of a portion of the farming operations from Pakco (T. 3898; 3916-20).

* A contemporaneous independent appraisal valued HIMCO at $5,250,000 and Elliott at $3,800,000, a total of $9,050,000 for the two (DLC "AR"; DLC "AS").

The agreement provided that unless the acquisition was ratified by the stockholders of Crescent on or before May 31, 1966, Pakco would return to Crescent the 600,000 Crescent shares (GX 185).

As of May 31, 1966, Crescent's proxy material had not been cleared by the SEC, and the agreement between Pakco and Crescent was amended to provide that if within forty-five days after Crescent had received the clearance of the SEC to use its proxy soliciting material, the stockholders of Crescent had not voted to ratify the acquisition, Crescent would return to Pakco the stock of the two acquired companies and Pakco would return to Crescent the 600,000 shares of Crescent stock (T. 1896-98; GX 186).

As of November 1, 1966, the agreement was further amended to provide that if the acquisition of HIMCO and Elliott had not been ratified by the stockholders of Crescent on or before December 31, 1966, the acquisition agreement would be deemed terminated and lapsed, in accordance with its terms, as of December 31, 1966 (GX 187).**

Crescent's proxy material was not cleared by the SEC, and subsequent to December 31, 1966, Crescent did in fact return to Pakco the stock of HIMCO and Elliott; and Pakco did in fact return the 600,000 shares of stock of Crescent to Crescent (T. 2671-72).

g. ALCA's Second Payment on the Floersheimer Block

ALCA made the second payment on the Floersheimer block in June, 1966, redeeming its convertible

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** The agreement dated November 1, 1966 was executed during the month of December, 1966 (T. 2163).

preferred stock, Series A, by the cash payment of approximately $2,231,000 (GX 157-162). The bulk of this, $2,000,000, was obtained from Colasurdo, and represented the proceeds of a bank borrowing by him; $120,000 represented a borrowing from M. Lippincott Mortgage Investment Company ("Lippincott"), and the balance were funds on hand in ALCA's bank account (T. 4158, and see below).

1. The Bank Loan

ALCA obtained $2,000,000 in June, 1966, from Colasurdo, who had borrowed that amount from Franklin National Bank (GX 173; GX 174; GX 176; GX 178; GX 179; GX 180). At the outset of the borrowing, Colasurdo's loan was collateralized by 200,000 shares of Crescent stock owned by, and loaned to him by, Pakco (GX 138J; GX 138L; GX 173; GX 176). These shares were part of the 600,000 shares received by Pakco from Crescent in exchange for the stock of HIMCO and Elliott (T. 2675).

Under the terms of the escrow agreement between ALCA and First Pennsylvania, 174,560 shares of Crescent were to be and were automatically released to ALCA upon the making of this payment (GX 38; GX 163). When these 174,560 shares of Crescent were released by First Pennsylvania, they were deposited with Franklin National Bank; the 200,000 shares were then released and returned to Pakco (GX 175, GX 176; DLC "W").

The 200,000 shares were borrowed by Colasurdo on June 2, 1966, and returned to Pakco on June 13, 1966 (DLC "W"; GX 138M; GX 138O; GX 176). While the shares were out of Pakco's possession, they were subject to a stop transfer order which had been placed

with the transfer agent (T. 2676). Colasurdo told the SEC of the loan of these shares and Becher and Colasurdo testified that Colasurdo gave Pakco a personal note and 50,000 shares of Pakco as collateral on the borrowing (T. 1907-08; 1911-13; 1980-81).*

2. The Lippincott Loan

ALCA obtained $120,000 in June, 1966, from Lippincott, which acted as a producer of consumer loan paper for HIMCO, then a wholly-owned subsidiary of Crescent (T. 5664; GX 165). At the same time, Lippincott had received an advance of $120,000 from HIMCO, which received an advance of $115,000 from Crescent (GX 37V; GX 177).** According to Whorl's SEC testimony, during 1966, advances from Crescent to HIMCO totalled more than $600,000 (included in this amount was $115,000 advanced in June, 1966), and Colasurdo testified that these advances were made to increase HIMCO's borrowing base (T. 5671-72; 5676-77; 5677-78). Colasurdo also testified before the

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* There was proof that the loan of these specific shares was not authorized at a formal meeting of Pakco's Executive Committee, but the government also introduced a general corporate authorization from Pakco to Colasurdo, authorizing him to sell, assign and transfer stocks, bonds, mortgages, etc. (GX 21).

** The government contended that Lippincott's loan to Colasurdo was, in effect, a use by Colasurdo of assets of Crescent, although it had introduced no evidence aside from the fact of the various transfers; the SEC expert witness who traced the funds testified that he could not say why each of the transfers had been made (for example, whether any of the transfers represented repayment of debts), nor could he say whether these were isolated transactions as opposed to a continual course of dealings between the various companies (T. 4165-66).

SEC that the transfer from Lippincott to ALCA constituted a loan, and Becher testified that the transfer from HIMCO to Lippincott was an advance to Lippincott out of its reserve (T. 5664; 5666-5670).

h. Pakco Acquires Control of Crescent

In April, 1967, Pakco acquired the Floersheimer and Mencher blocks at a price below the cost to ALCA and BLCB. Thus, on April 10, 1967, as of March 1, 1967, Pakco acquired (a) all of the issued and outstanding stock of ALCA, the primary asset of which was 436,000 shares of Crescent stock, for $6,388,781,* although ALCA's cost had been $6,546,000, and, (b) 99,750 shares of Crescent stock from BLCB for $1,293,864,** although BLCB's cost had been approximately $1,300,000 (DLC "BL-1"; DLC "BL-2"; DLC "BL-3"; DLC "BM"). Neither Colasurdo nor Bronsen realized any profit from these transactions.

During the same month, Pakco acquired 125,000 shares of Crescent stock from Caletta at an attributed price of $15 per share (GX 523B). In payment for this stock, Caletta's obligation to Pakco was reduced by $1,875,000 (GX 523B). These acquisitions brought Pakco's holdings of Crescent stock to 661,150 shares, thus giving Pakco control of Crescent.***

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* This figure is based on (a) the provision of the agreement dated April 10, 1967 (DLC "BL-1"); (b) the assumed obligation to redeem ALCA series B Preferred in June, 1967 (LDC "BN-10"); and (c) the attributed value of a retained stock dividend computed at $17 per share.

** This figure is based on the provisions of the agreement dated April 10, 1967 (DLC "BM"). The stock dividend on these shares was sold to Pakco.

*** The government argued that since these shares were acquired after the SEC investigation had begun, the acquisi-

The third and final payment was made on the Floersheimer block in June, 1967, by ALCA's cash payment of $2,232,307.22 (DLC "BN-10"). The bulk of this—$2,150,000—was borrowed by ALCA, then a wholly-owned subsidiary of Pakco, from Pakco which in turn borrowed that amount from a bank (DLC "BN-2"; DLC "BN-4"; DLC "BN-5"). That loan was supported by various collateral, including 130,712 shares of Pakco stock registered in the name of Lewis L. Colasurdo, Voting Trustee, which had been loaned to Pakco to assist it in obtaining the loan (DLC "BN-2"). The loan was personally guaranteed by Colasurdo (DLC "BN-2"; DLC "BN-11").

In March, 1968, Pakco sold the Floersheimer block, the Mencher block, and the 125,000 shares of Crescent it had received from Caletta—a total of 661,150 shares for which it had paid $9,557,645—for more than $11,239,550 cash to National Industries, an unrelated company listed on the New York Stock Exchange (DLC "BO-1 through 6"). As a result of the transaction, Pakco realized a profit of $1,681,905.

i. The SEC Proceedings

By orders dated June 9, 1966, the SEC directed the institution of a private investigation and designated officers to take testimony In the Matter of Crescent Corporation and In the Matter of Pakco Companies. This investigation involved the testimony of the defendants and others and continued for six months (GX 123C).

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tion was made because of the investigation. The defendants contended that it was intended from the first that Pakco acquire these blocks, that their acquisition in 1967 was the fulfillment of that original intention, and that the SEC investigation had nothing to do with it.

By orders dated January 5, 1967 (Crescent) and January 30, 1967 (Pakco), public proceedings were instituted. The two public proceedings were consolidated by order dated March 16, 1967, and the hearings were begun on April 10, 1967 (GX 123C).

These proceedings were the focal point of a major portion of the trial. Approximately 1000 pages of testimony given by the defendants were read into evidence and the alleged subornation and obstruction related to these proceedings. The proceedings were aimed at obtaining, and resulted in the filing of, amended reports by Crescent and Pakco.*

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* Colasurdo was convicted on four counts of filing false statements with the SEC. Two of those were monthly reports —8-Ks—and two annual reports—10-Ks. The facts relevant to those charges are set forth below at Point V.

APPENDIX F

Count One of the Indictment
Those portions of Count One printed in italics were removed by the trial court at the close of the government's case.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

LEWIS L. COLASURDO, MICHAEL J. McLANEY, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, RICHARD G. TAYLOR, PEDRO J. TORRES, FREDERICK J. WAGNER and EVERETT A. WHORL, DEFENDANTS

The Grand Jury charges:

1. From on or about January 1, 1964 and continuously thereafter, up to and including the filing of this indictment in the Southern District of New York and elsewhere, LEWIS L. COLASURDO, MICHAEL J. McLANEY, JOHN W. BECHER, ALEXANDER N. BRONSON, ANTHONY CIPO, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, RICHARD G. TAYLOR, PEDRO J. TORRES, FREDERICK J. WAGNER, and EVERETT A. WHORL, named as defendants herein, Melvin Shields, ALCA Industries Corporation, BLCB Industries Corporation, Caletta Blueberry Company, Inc., Delaware & N.J. Properties, Inc., and Makepeace, Inc., named as co-conspirators herein, and other persons to the Grand Jury

known and unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each other to defraud the United States and an agency thereof, to wit, the United States Securities and Exchange Commission, and to commit certain offenses against the United States, to wit, to violate Title 15, United States Code, Sections 78m and 78ff(a) and the rules and regulations thereunder, and Title 18, United States Code, Sections 1001, 1341, 1343, 1505, 1621 and 1622.

2. It was part of said conspiracy that the defendants and their co-conspirators, unlawfully, willfully and knowingly would combine, conspire, confederate, and agree to defraud the United States and an agency thereof, to wit, the United States Securities and Exchange Commission, by submitting and causing to be submitted to said agency false, fraudulent and misleading offers of settlement, thereby impairing, obstructing and impeding said agency in the proper administration and enforcement of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

3. It was further part of said conspiracy that the defendants and their co-conspirators, in a matter within the jurisdiction of the United States Securities and Exchange Commission, unlawfully, willfully and knowingly would make false, fictitious, and fraudulent statements and representations.

4. It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully and knowingly would make and cause to be made statements in reports to be filed with the New York Stock Exchange, a national securities exchange, and the United States Securities and Exchange Com-

mission under Title 15, United States Code, Section 78m, which statements would be false and misleading with respect to material facts.

5. It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully and knowingly would fail to file reports with the New York Stock Exchange, a national securities exchange, and the United States Securities and Exchange Commission, which reports were required to be filed under Title 15, United States Code, Section 78m.

6. *It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully and knowingly would devise a scheme and artifice to defraud the stockholders and creditors of Pakco Companies, Inc. and Crescent Corporation and the creditors from whom the defendants and their co-conspirators borrowed in connection with the acquisition of Crescent Corporation stock, and for the purpose of executing such scheme and artifice would place in a post office and authorized depository for mail matter, matter to be sent and delivered by the Post Office Department and would take and would receive from the Post Office Department mail matter, and would cause mail matter to be delivered by mail according to the directions thereon.*

7. *It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully and knowingly would devise a scheme and artifice to defraud the stockholders and creditors of Pakco Companies, Inc. and Crescent Corporation and the creditors from whom the defendants and their co-conspirators borrowed in connection with the acquisition of Crescent Corporation stock and would transmit*

and cause to be transmitted by means of wire, telephone conversations and other signs, signals and sounds in interstate commerce for the purpose of executing such scheme and artifice.

8. It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully, knowingly, corruptly, and by threat would endeavor to influence, obstruct and impede the due and proper administration of the law under which proceedings before the United States Securities and Exchange Commission were being conducted.

9. It was further part of said conspiracy that the defendants and their co-conspirators would take oaths that they would testify truly before competent officers of the United States Securities and Exchange Commission inquiring in a case in which a law of the United States authorizes an oath to be administered and unlawfully, willfully and knowingly, and contrary to such oaths, would state material matters which they did not believe to be true.

10. It was further part of said conspiracy that the defendants and their co-conspirators unlawfully, willfully and knowingly would procure others to commit perjury.

11. Among the means by which the defendants would and did carry on said conspiracy, were the following:

a. *The defendants LEWIS L. COLASURDO, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, FREDERICK J. WAGNER and EVERETT A. WHORL would and did control Pakco Companies, Inc. and its subsidiary companies (hereafter all referred to as "Pakco").*

b. *The defendants LEWIS L. COLASURDO and ALEXANDER N. BRONSON would and did acquire control of Crescent Corporation and its subsidiary companies (hereafter all referred to as "Crescent"), by purchasing, through companies wholly owned by them and created for the purpose, a controlling share of the common stock of Crescent.*

c. *Assets of Pakco and Crescent would be and were directly and indirectly used to finance said acquisition in part as follows:*

i. *The defendants LEWIS L. COLASURDO, MICHAEL J. McLANEY, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, FREDERICK J. WAGNER and EVERETT A. WHORL, would and did cause the sale of a substantial asset of Pakco, to wit, a blueberry plantation, to Crescent through two conduit corporations (Calletta Blueberry Company, Inc. and Makepeace, Inc.) and would and did cause approximately $2,000,000 of the purchase price for said plantation to be transferred from Crescent through two conduct corporations (Makepeace, Inc. and Delaware & N.J. Properties, Inc.) to and for the defendant LEWIS L. COLASURDO.*

ii. *The defendants LEWIS L. COLASURDO, JOHN W. BECHER, ANTHONY COLASURDO, FREDERICK J. WAGNER, and EVERETT A. WHORL, would and did cause Pakco to lend the defendant LEWIS L. COLASURDO another substantial asset of Pakco, to wit, 200,000 shares of Crescent stock, which loan was not properly authorized. Said 200,000 shares would and did collateralize a loan, the proceeds of which would be and were used by the defendant LEWIS L. COLASURDO.*

iii. *The defendants LEWIS L. COLASURDO, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY COLASURDO, FREDERICK J. WAGNER and EVERETT A. WHORL would and did cause Pakco to lend $100,000 to defendant ALEXANDER N. BRONSEN.*

iv. *To maintain the collateral on a loan extended to defendant ALEXANDER N. BRONSEN by the Franklin National Bank, the defendants LEWIS L. COLASURDO, MICHAEL J. McLANEY, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, and EVERETT A. WHORL would and did transfer to the Franklin National Bank 30,000 shares of Crescent stock held as collateral by Caletta Blueberry Company, Inc., a debtor of Pakco by virtue of the sale of the blueberry plantation referred to in sub-paragraph 11(c)(i) above.*

d. In the following ways, among others, the defendants LEWIS L. COLASURDO, MICHAEL J. McLANEY, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, RICHARD G. TAYLOR, PEDRO J. TORRES, FREDERICK J. WAGNER and EVERETT A. WHORL would and did conceal from the United States Securities and Exchange Commission and from the creditors and stockholders of Pakco and Crescent and the creditors from whom the defendants and their co-conspirators borrowed in connection with the acquisition of Crescent stock the fact that assets of Pakco and Crescent were being and had been used for the personal gain of the defendants LEWIS L. COLASURDO and ALEXANDER N. BRONSEN to finance their acquisition of Crescent stock:

i. The defendants LEWIS L. COLASURDO, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, ISRAEL FINKELSTEIN, FREDERICK J. WAGNER and EVERETT A. WHORL would and did fail to disclose facts, and would and did cause facts to be omitted, concealed and misstated, which were material to an understanding of the way in which defendants LEWIS L. COLASURDO and ALEXANDER N. BRONSEN financed their acquisition of Crescent stock, in reports required to be filed with the United States Securities and Exchange Commission and the New York Stock Exchange in accordance with the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder.

ii. All the defendants would and did testify falsely under oath and procure others to testify falsely under oath and aid and abet others to testify falsely under oath before officers of the United States Securities and Exchange Commission in order to conceal facts material to an understanding of the way in which the defendants LEWIS L. COLASURDO and ALEXANDER N. BRONSEN financed their acquisition of Crescent stock.

iii. All the defendants would and did make and cause to be made false and misleading statements and representations to the United States Securities and Exchange Commission in matters within its jurisdiction in order to conceal and misstate facts material to an understanding of the way in which LEWIS L. COLASURDO and ALEXANDER N. BRONSEN financed their acquisition of Crescent stock.

iv. The defendants LEWIS L. COLASURDO and EVERETT A. WHORL would and did corruptly and

by threat endeavor to influence, obstruct, and impede the due and proper administration of the law under which proceedings pending before the United States Securities and Exchange Commission were being conducted.

v. The defendants LEWIS L. COLASURDO, JOHN W. BECHER, ALEXANDER N. BRONSEN, ANTHONY CIPO, ANTHONY COLASURDO, RICHARD G. TAYLOR, PEDRO J. TORRES and EVERETT A. WHORL would and did submit and cause to be submitted to the United States Securities and Exchange Commission false, fictitious, fraudulent and misleading offers of settlement in an attempt to induce the United States Securities and Exchange Commission to discontinue its investigation into the manner in which the defendants LEWIS L. COLASURDO and ALEXANDER N. BRONSEN financed their acquisition of Crescent stock and to prevent the United States Securities and Exchange Commission from taking such further steps as it might deem necessary were it fully familiar with all the facts underlying said acquisition.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

On or about the dates set forth, the defendants specified, testified before officers of the United States Securities and Exchange Commission.

DATE	DEFENDANT
1. June 17, 1966	LEWIS L. COLASURDO
2. June 18, 1966	ALEXANDER N. BRONSEN
3. May 18, 1967	EVERETT A. WHORL
4. May 18, 1967	LEWIS L. COLASURDO
5. May 19, 1967	LEWIS L. COLASURDO

On or about the dates set forth, the defendants LEWIS L. COLASURDO and EVERETT A. WHORL caused the documents specified to be mailed to the New York Stock Exchange, New York, New York and the United States Securities and Exchange Commission, Washington, D.C., respectively:

DATE	DOCUMENT
6-7. July 9, 1965	Current Report of Crescent Corporation on Form 8-K for the month of June, 1965.
8-9. October 10, 1965	Current Report of Crescent Corporation on Form 8-K for the month of September, 1965.
10-11. January 10, 1966	Current Report of Crescent Corporation on Form 8-K for the month of December, 1965.
12-13. July 6, 1966	Annual Report of Crescent Corporation on Form 10-K for the fiscal year ended December 31, 1965.
14-15. July 20, 1966	Amendment No. 1 to the Annual Report of Crescent Corporation for the fiscal year ended December 31, 1965, referred to in Overt Acts, "12-13" above.
16-17. July 27, 1966	Amendment No. 1 to the Current Report of Crescent Corporation for December, 1965, referred to in Overt Acts, "10-11" above.

On or about the dates set forth, the defendants specified attended a meeting:

	DATE	DEFENDANT
18.	June 29, 1965	LEWIS L. COLASURDO
19.	June 29, 1965	ALEXANDER N. BRONSEN
20.	July 27, 1965	LEWIS L. COLASURDO
21.	July 27, 1965	ALEXANDER N. BRONSEN
22.	July 27, 1965	EVERETT A. WHORL
23.	August 17, 1965	LEWIS L. COLASURDO
24.	August 17, 1965	ALEXANDER N. BRONSEN
25.	September 25, 1965	ALEXANDER N. BRONSEN
26.	September 25, 1965	ANTHONY CIPO
27.	September 25, 1965	ISRAEL FINKELSTEIN

(Title 18, United States Code, Section 371.)

APPENDIX G.

STATUTES INVOLVED

15 U.S.C. § 78m provides in relevant part:

(a) Every issuer of a security registered pursuant to section 78*l* of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78*l* of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports, in the ap-

praisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter, and, in the case of carriers subject to the provisions of section 20 of Title 49, or carriers required pursuant to any other Act of Congress to make reports of the same general character as those required under section 20 of Title 49, shall permit such carriers to file with the Commission and the exchange duplicate copies of the reports and other documents filed with the Interstate Commerce Commission, or with the governmental authority administering such other Act of Congress, in lieu of the reports, information and documents required under this section and section 78*l* of this title in respect of the same subject matter.

* * * *

15 U.S.C. § 78ff provides in relevant part:

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the

observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

* * * *

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No. 71-1066

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO AND EVERETT A. WHORL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
BEATRICE ROSENBERG,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

American Communications Assn. v. Douds, 339 U.S. 382	8
Bain, Ex Parte, 121 U.S. 1	6
Boyce Motor Lines v. *United States*, 342 U.S. 337	8
Costello v. United States, 350 U.S. 359	9
Gaither v. *United States*, 413 F. 2d 1061	7
Gruenwald v. *United States*, 353 U.S. 391	2, 7, 8
Ingram v. *United States*, 360 U.S. 672	8
Lawn v. *United States*, 335 U.S. 339	9
New England Enterprises, Inc. v. *United States*, 400 F. 2d 58; certiorari denied, 393 U.S. 1036	7
Overstreet v. *United States*, 321 F. 2d 459, certiorari denied, 376 U.S. 459	7
Salinger v. *United States*, 272 U.S. 524	6, 7
Stewart v. *United States*, 12 F. 2d 524	7
United States v. *Blue*, 384 U.S. 251	9–10
United States v. *Ragen*, 314 U.S. 513	8, 9

462-345—72

Statutes:

	Page
15 U.S.C. 78m	2
15 U.S.C. 78ff(a)	2, 8
18 U.S. 371	2

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OPINION BELOW

The opinion of the court of appeals is reported at 453 F. 2d 585.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1971. A petition for rehearing was denied on January 20, 1972. The petition for a writ of certiorari was filed on February 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the action of the trial judge in withdrawing from the jury's consideration certain purposes

charged in the conspiracy count violated petitioners' right to be tried on the indictment returned by the grand jury.

2. Whether under the decision of this Court in *Grunewald* v. *United States*, 353 U.S. 391, the evidence was legally sufficient to sustain the conviction on the conspiracy count.

3. Whether a defendant charged with willfully and knowingly filing a materially false and misleading report may avoid conviction on due process grounds simply because he had to exercise some judgment in determining whether the inclusion of particular facts was material to the accuracy of the report.

4. Whether the trial judge was required to conduct a pre-trial hearing to determine the competency and adequacy of evidence before the grand jury which indicted petitioners.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to defraud the Securities & Exchange Commission and to commit certain offenses against the United States in violation of 18 U.S.C. 371. Petitioner Colasurdo was also convicted on four substantive counts of filing false statements with the S.E.C. and the New York Stock Exchange, in violation of 15 U.S.C. 78m and 78ff(a). Petitioner Whorl was convicted on two of those counts. Colasurdo was sentenced to two years' imprisonment on the conspiracy count and one year on each of the substantive counts, the sentences to run concurrently, and was fined an aggregate of $50,000. Whorl was sen-

tenced to one year's imprisonment on the conspiracy count and was fined an aggregate of $30,000. Petitioners Cipo and McLaney were each fined $10,000 and McLaney received a one-year suspended sentence.

The opinion of the court of appeals sets out in detail the complicated scheme whereby petitioners acquired control of the Crescent Corporation, a publicly held corporation, using the very assets of Crescent to accomplish the feat. In so doing, petitioners engaged in a series of transactions the sham nature of which was illegally concealed from the SEC. The substance of these transactions was as follows.

In 1965, Colasurdo was president of Pakco Companies, Inc., and with his two brothers owned 42% of its corporate stock. Pakco owned a 2,500 acre tract in New Jersey devoted to raising blueberries. This asset was carried on the corporate books at a value of one dollar. On May 19, 1965, Pakco authorized sale of the tract to one Meyers or his nominee for $3,850,000, payment to be $500,000 by December 1, 1965, the balance in five equal annual installments thereafter. The only security given for the note was the guarantee of petitioner McLaney (Pet. App. A, 3a–4a). This agreement was executed on May 31, 1965, title being taken by McLaney in the name of Caletta Blueberry Company. On August 31, 1965, Caletta sold the tract to Makepeace, Inc., a corporation owned by petitioner Cipo, for $3,900,000. This was to be paid by $500,000 one day before the Meyers-McLaney payment to Pakco and the balance in five equal annual installments payable three months before and in an amount

$10,000 greater than the Meyers-McLaney payments to Pakco. The deeds from Pakco to Caletta and from Caletta to Makepeace were both recorded on September 23, 1965.[1] Petitioner Whorl was controller of Pakco and secretary-treasurer of Caletta (Pet. App. A, 4a–5a).

While these maneuvers were taking place, Colasurdo was also taking steps to buy two blocks of stock of Crescent, which would give him control of that company. He organized ALCA Industries, a corporation, and made a deal for the purchase of one block of Crescent stock for $6,546,000, to be paid for in three equal annual installments in June of 1965, 1966, and 1967. He financed the initial payment by having ALCA borrow $218,200 from Pakco and the balance by a bank loan, secured by his personal guaranty, by ALCA stock, and by the stock to be acquired from Crescent. At the same time, co-defendant Bronsen, vice-president of Pakco, was occupied in the formation of a corporation, BLCB Industries, and in the arrangement for buying a second block of Crescent stock for $1,875,000. This sum was to be paid on a basis of one-third in June 1965, the same closing date as the ALCA purchase, with the balance to be paid in three equal payments at intervals of six months thereafter. This was financed by a loan of $100,000 from Pakco to Bronsen and a $900,000 loan from another bank, guaranteed by Colasurdo and by the Crescent stock acquired (Pet. App. A, 3a–4a).

[1] Both Caletta and Makepeace were incorporated by the same attorney, co-defendant Finkelstein, who died before trial.

Control of Crescent having thus been acquired, Colasurdo, Bronsen, Whorl, and another nominee were named as four of the seven-member directorate, with Colasurdo as president. On September 15, 1965, Crescent, under its new leadership, agreed to buy the 2,500-acre blueberry tract from Makepeace for $4,000,000. This was to be accomplished by a cash payment of $600,000, shares of Crescent stock valued at $1,500,000, and an installment promissory note by Crescent for $1,900,000 with a right of prepayment. On September 23, 1965, the deeds to Caletta and by Caletta to Makepeace were recorded and on September 25 title was transferred to Crescent. Crescent then prepaid the $1,900,000 note to Makepeace, Makepeace paid $500,000 to Caletta, which paid it to Pakco. Makepeace now had a cash balance of $2,000,000, which it transferred to a corporation formed by Bronsen (Delaware and New Jersey Properties, Inc.), which transferred it to ALCA, which paid off its bank loan (Pet. App. A, 5a–6a).

By April 1967, Pakco had acquired all of the Crescent stock of ALCA and Caletta, which it later sold for a profit in excess of $1,600,000. This had been accomplished by the use of Crescent's own money. Since Crescent had made immediate payment of its obligation to Makepeace, Colasurdo was able to pay off ALCA's bank loan, but in the meantime Caletta would have five years before it had to repay Pakco. And since each dummy corporation had made a profit on its sham sales, McLaney and Cipo had both re-

ceived substantial compensation for their participation in the scheme (Pet. App. A, 6a–7a).

Crescent made various reports to the S.E.C. and to the New York Stock Exchange showing acquisition of its stock by ALCA, issuance of stock "in exchange for land, buildings, machinery, and equipment" and acquisition of the "net assets of a land development" company. It did not divulge that it was dealing with an affiliate or the interest of Colasurdo in the land in question or his ownership of ALCA or BLCB (Pet. App. A, 7a–8a). The filing of the false and misleading statements comprised the substantive counts upon which Colasurdo and Whorl were convicted. The concealment of the true nature of the transactions formed the basis of the charge of conspiracy to defraud the S.E.C.

ARGUMENT

1. The trial judge's action in limiting the scope of the conspiracy count by withdrawing certain portions of the charge from the jury's consideration did not deprive petitioners of their right to be tried on charges returned by the grand jury. In *Salinger* v. *United States*, 272 U.S. 542, a case indistinguishable from the present case, it was held that the withdrawal of portions of a charge from the jury did not violate the defendant's right to be tried on an indictment returned by the grand jury, 272 U.S. 548–549. *Ex Parte Bain*, 121 U.S. 1, upon which petitioners rely, was limited to its peculiar facts.[2]

[2] The decision in *Salinger* did not, as petitioners suggest, turn on the defendant's consent to the judge's action.

The withdrawal of portions of the conspiracy count in the present case, as the court of appeals held, was not prejudicial, "since the elimination of the supporting allegations of the fraud on creditors and stockholders narrowed, rather than broadened, the reach of the conspiracy count" and "the portion of the manifold scheme ordered stricken was unnecessary to the commission of the basic fraud charge" (Pet. App. A, 10a–11a). The decision is clearly correct and in accord with *Salinger* v. *United States, supra*. See also, *New England Enterprises, Inc.* v. *United States*, 400 F. 2d 58, 62 (C.A. 1), certiorari denied, 393 U.S. 1036; *Overstreet* v. *United States*, 321 F. 2d 459, 461 (C.A. 5), certiorari denied, 376 U.S. 919.[3]

2. Petitioners allege that under *Grunewald* v. *United States*, 353 U.S. 391, the evidence was insufficient to sustain a conviction on the conspiracy charge because there was no *direct* evidence of an agreement to accomplish the objectives of the conspiracy to defraud the S.E.C. The holding in *Grunewald*, as the opinion makes clear, is applicable only where the

[3] There is no real conflict among the circuits. *Stewart* v. *United States*, 12 F.2d 524 (C.A. 9), preceded the decision in *Salinger*, and *Carney* v. *United States*, 163 F.2d 784, 788–790 (C.A. 9), involved a "serious situation" in which one count of an indictment, insufficient as drawn, was amended to state an offense. *Gaither* v. *United States*, 413 F. 2d 1061 (C.A.D.C.), involved an entirely different issue than that present here. The decision, however, recognized that the proscription against formal amendment could be obviated by permitting the prosecutor to prove the facts which the amended indictment would have charged. "Thus * * * there is a variance. And the accepted rule is that a variance does not call for dismissal of the indictment except on a showing of prejudice" (413 F. 2d 1072).

prosecution seeks to rely on acts of concealment, undertaken after the conspiracy's criminal objectives have been fully accomplished, to avoid the bar of the statute of limitations. The holding does not apply to cases in which the acts of concealment are undertaken in furtherance of the central objective of the conspiracy. *Grunewald* v. *United States*, 353 U.S. at 405; *Ingram* v. *United States*, 360 U.S. 672, 679 n. 10. In the instant case, as the court of appeals held, "concealment was the essence of the object of the conspiracy" to defraud the S.E.C. by concealing the sham nature of the transactions which resulted in the takeover of Crescent (Pet. App. A, 14a).

3. Count 26 of the indictment charged petitioner Colasurdo with filing a materially false and misleading report with the S.E.C. in violation of 15 U.S.C. 78ff(a). Petitioner alleges that he did not have any notice that the particular facts he is accused of omitting were material. The fact that the petitioner was called upon to exercise some judgment in determining whether failure to disclose would render the report materially false and misleading does not invalidate his conviction on due process grounds. *United States* v. *Ragen*, 314 U.S. 513, 523–524; *American Communications Assn.* v. *Douds*, 339 U.S. 382; *Boyce Motor Lines* v. *United States*, 342 U.S. 337. Petitioner was not being prosecuted for an honest mistake but for "willfully and knowingly" filing a report which was materially "false or misleading" (15 U.S.C. 78ff (a)). As this Court observed in an analogous case, *United States* v. *Ragen, supra*, "On no construction

can the statutory provisions here become a trap for those who act in good faith. A mind intent upon willful evasion [or deceit] is inconsistent with surprised innocence. * * * And the charge given by the trial court amply instructed the jury that scienter is an essential element of the offense" (314 U.S. at 524). The court of appeals correctly concluded in the present case that that "question is ultimately one of honesty and good faith" and that the evidence was sufficient to sustain the conviction (Pet. App. A, 19a).[4]

4. The court of appeals held that the trial judge did not err in refusing to hold a preliminary hearing to determine whether the grand jury had before it evidence obtained in violation of the attorney-client privilege. The court of appeals noted that two of the three attorneys who testified before the grand jury testified at the trial. Their grand jury testimony, which was made available to defense counsel, disclosed no violation of the attorney-client privilege. While the testimony of the third attorney was not available for review, the court of appeals correctly concluded that even if some privileged testimony had cropped into the proceedings a dismissal of the indictment would not be warranted. *Costello* v. *United States*, 350 U.S. 359, 363; *Lawn* v. *United States*, 355 U.S. 339, 348–350; *United States* v. *Blue*, 384 U.S. 251,

[4] This argument affects only one of the five counts of the indictment upon which Colasurdo was convicted. A decision upsetting his conviction on Count 26 would not affect the two-year prison sentence he received on the conspiracy count which was to run concurrently with the concurrent one-year sentences on each of the four substantive counts.

255. Any other holding, the court observed, would require a trial judge to hold "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay" (Pet. App. A, 24a).

Contrary to the petitioners' argument, this rule does not "threaten the attorney-client privilege." Not only may the privilege be invoked at the trial, but the attorney himself is under an independent obligation to assert the privilege or face disciplinary proceedings. Under these circumstances requiring an additional pre-trial hearing for the purpose of examining the evidence before the grand jury would further delay and impede the progress of a criminal trial. The risk of possible abuse does not warrant overruling the decisions of this Court which petitioners acknowledge "can be read to foreclose inquiry as to whether evidence before a grand jury was obtained in violation of a defendant's privilege" (Pet. 27).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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---

REPLY BRIEF FOR PETITIONERS

In its response, the government fails to meet the issues raised in the petition. An analysis of what the government says, and what it does not say, underscores the importance of the issues raised and the appropriateness of the case for certiorari.

1. The government relies on *Salinger* v. *United States*, 272 U.S. 542 (1926) for the proposition that a court may amend the indictment so long as it does

not prejudice the defendant at trial. It suggests that *Ex Parte Bain*, 121 U.S. 1 (1887), which holds to the contrary, has been "limited to its peculiar facts." (Gov. Br. 6). Apparently the government would consign *Ex Parte Bain* to a legal graveyard. This Court has refused to do that. In *Russell* v. *United States*, 369 U.S. 749 (1962) it reaffirmed the holding and the rationale of *Bain*. Two years earlier, the Court observed that *Bain* "has never been disapproved . . ." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Indeed it is the continuing vitality of *Bain* and the conflicting decision in *Salinger* which has produced confusion and conflict among the lower courts. Accordingly the issue is a proper and important one for review.

2. Under the government's reading of *Grunewald* v. *United States*, 353 U.S. 391 (1957) the court must determine whether the acts of concealment were undertaken in furtherance of the central objective of the conspiracy or whether they were undertaken after the criminal objectives had been accomplished. In the latter case the evidentiary standards of *Grunewald* apply; in the former they do not. Yet the government does not explain why, if that determination is crucial, it was proper for the court of appeals rather than the jury to make it. Compare *Grunewald* at 406-15.

The government does not attempt to justify the arbitrary distinction created by the decision below between those cases to which *Grunewald* applies and those to which it does not (See Pet. 18-20). Instead

it merely recites the court of appeals' characterization that "concealment was the essence of the object of the conspiracy" (Gov. Br. 8). Both the government and the court of appeals ignored the fact that the indictment, before amendment, charged a conspiracy to defraud shareholders and then to conceal that fraud.[1]

3. Count 26 of the indictment charged that the Crescent certified financial statement for 1965 was false and misleading because it did not disclose that the seller of the blueberry plantation was an affiliated corporation. As we pointed out (Pet. 20-25), the SEC statutes and regulations do not specify that such an affiliation must be disclosed. The government does not dispute that. Instead it attempts to convert the issue into one of good faith and suggests that the element of scienter in the statute makes up for its failure to disclose what conduct it prohibits. The issue, however, is not one of honesty, good faith, or scienter. If the statute and the regulations which govern the content of the report do not require that a particular fact be disclosed, then failure to disclose it should not be criminal, no matter what the defendant's state of mind.

United States v. *Ragen*, 314 U.S. 513 (1942), relied on by the government, is inapposite. There the

---

[1] Much of the evidence at trial concerned the corporate transactions and the alleged fraud on shareholders and creditors. Here the government's Statement is devoted almost exclusively to a description of the corporate transactions rather than the concealment which it alleges was the essence of the conspiracy (See Gov. Br. 2-6).

defendant charged that the term "reasonableness" as used in a provision of the Internal Revenue Code was unconstitutionally vague. In rejecting that contention the Court found that "there has not been any apparent general confusion bespeaking inadequate statutory guidance" and that "experience and common sense" demonstrated that the term was not vague. 314 U.S. at 524. Here just the opposite is the case. The accounting profession, which reflects the "experience and common sense" in this area, is divided over whether affiliations must be disclosed (Tr. 6482-85) and the statute provides no guidance whatsoever.[2]

4. The government argues that to grant petitioners a remedy to determine whether the grand jury acted on evidence obtained in violation of their attorney-client privilege would "impede the progress of a criminal trial" (Gov. Br. 10). That seems unlikely since allowing defense attorneys to inspect the appropriate grand jury minutes would ordinarily be sufficient and would cause no delay.

Moreover, since we assume that it is only in the unusual case that a defendant's attorney is called

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[2] The government incorrectly states that Colasurdo received a one-year sentence on each of the four substantive counts (Gov. Br. 2, 9, n.4). The only substantive count on which he received a prison sentence was Count 26, on which he received one year. He received a concurrent two-year sentence on the conspiracy count. One of the objects alleged in the conspiracy count was the filing of false statements, including the report on which Count 26 is based. Thus reversal on Count 26 would require an analysis of whether the evidence relating to that report admitted on the conspiracy count tainted the conspiracy conviction.

before the grand jury, if the remedy did cause delay, it would occur infrequently. If, however, we are wrong in that assumption, and defendants' attorneys are summoned before grand juries with some frequency, then it is all the more important that courts inquire whether this practice results in violations of the privilege.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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